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A

SELECTION OF CASES

ON

THE LAW OF PLEADING

UNDER MODERN CODES

COLLECTED AND ANNOTATED

BY

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SECOND EDITION

CHICAGO
CALLAGHAN & COMPANY
1922

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1922

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PREFACE TO SECOND EDITION

Toward the close of the eighteenth century the courts began to recognize that the later development of the common law pleading was not satisfactory. The ancient theory of special pleading leading to a single clear-cut issue, upon which both parties came prepared for trial, had been displaced by the growth of the general issue, until, in a majority of the actions, the formal issue made by the pleadings gave little or no information as to the real issues which would be disclosed by the evidence.

In England an attempt was made to improve the system of pleading by the adoption of the Hilary rules in 1834, but without marked success. The common law procedure act did not remove the objections, and dissatisfaction continued until the old system was finally supplanted by rules of court under the Judicature Act.

In the United States the same unsatisfactory conditions prevailed in the actions at law.

It was also becoming more apparent that the pleading in chancery was unduly complicated and prolix, and that the cumbersome scheme for discovery, which was largely responsible for the peculiar features of that system, had largely outlived its usefulness.

Agitation for reform in New York led to a proposal to unify the two systems of pleading, which was finally embodied in the Field Code of 1848, whose provisions were copied, in substance at least, in nearly all the later codes.

Whether the code is regarded as a mere statutory modification of the existing systems or as a complete substitute, in some respects closely resembling one or the other of the older systems, it is clear that the statutory language left much for construction, and that the system of code pleading as it exists today is the product of judicial construction during the last seventy

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years and can be understood only through a study of the cases which have made it.

It is the purpose of this collection to furnish the material for a study of this process of construction as applied to the more important provisions. For this reason many of the earlier cases have been used. Some of them do not represent the present state of the law, but they have affected its development. The first edition of this collection was prepared soon after the editor began teaching the subject. The pressing need for some material to meet the needs of classes which had become too large for the library facilities led to undue haste in its preparation. Under the conditions it is not surprising that mistakes were made.

Some fifteen years' experience in teaching has convinced the editor that some topics were overtreated and others inadequately covered and that a number of the cases were not well chosen. The purpose of the present revision is to remedy these defects, so far as possible, and to bring the work more in harmony with the later development of the subject. Since the Equity Rules of 1912 have placed the equity pleading in the federal courts largely on the code basis, the more important of these rules have been included in the notes. In general, notes have been added wherever it seemed worth while; but no attempt has been made to compete with the digests and encyclopedias in the collection of any considerable number of cases in accordance with, or contrary to, the principal cases.

The arrangement of topics in the main follows the first edition, but some explanation of the few changes may be helpful.

The section on splitting and consolidation of demands, which takes up the elements going to make up a single cause of action, and the equity view as to various sorts of relief in a single action, has been placed at the beginning as throwing light on extravagant statements found in some of the earlier cases as to the effect of the one form of action in fusing law and equity.

Much of the material in the section on the one form of action, dealing as it does with the sufficiency of a complaint, failing to state the cause of action attempted to be stated, but good on some other theory, and with some of the broader phases of variance, might well have been included in the chapter on the complaint. It seemed advisable, however, to develop these questions

separately and at an earlier stage, as laying the necessary foundation for the chapter on parties.

The chapter on demurrers has been placed immediately after the chapter on the complaint because that seemed the more natural order.

Within the sections, the cases have been arranged with some regard for chronology where practicable, and in some instances older cases have been added or substituted because they seemed more valuable for the purpose of study.

The first edition included more material than could be used in the time ordinarily available for such a course, and hence the present revision has been considerably reduced in bulk.

It is the hope of the editor that, as revised, this collection may prove more helpful in working out some of the perplexing problems in this branch of the law.

E. W. HINTON.

University of Chicago
July, 1922

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CASES ON CODE PLEADING

CHAPTER I.

ACTIONS.

CODE OF CIVIL PROCEDURE OF NEW YORK.[1]

§ 3333. The word "action," as used in the New Revision of the Statutes, when applied to judicial proceedings, signifies an ordinary prosecution, in a court of justice, by a party against

[1] The first New York Code of Procedure was drafted by a commission composed of David Dudley Field, Arphaxed Loomis and David Graham, and adopted by the Legislature in 1848. Soon afterwards, the Commission reported a revised draft which was adopted April 11, 1849. From time to time various amendments were made until 1876, when the code was revised, and the sections renumbered. In 1920, the Code of 1876, with various subsequent amendments, was supplanted by the Civil Practice Act, which, however, retains many of the original code provisions. The Code of 1849, with the amendments adopted shortly afterward, has served as a model for the Codes of the following states and territories:

Alaska, (1900); Arizona, (1864); Arkansas, (1868); California, (1850); Colorado, (1877); (since supplanted by an Act empowering the Supreme Court to make rules regulating pleading, etc.); Connecticut, (1879); Florida, (1870); (since supplanted by modified common law); Indiana, (1852); Iowa, (1851); Idaho, (1864); Kansas, (1859); Kentucky, (1851); Minnesota, (1851); Missouri, (1849); Montana, (1865); Nebraska, (1855); Nevada, (1860); New Mexico, (1897); North Carolina, (1868); North Dakota, (1862); Ohio, (1853); Oklahoma, (1890); Oregon, (1854); South Carolina, (1870); South Dakota, (1862); Utah, (1870); Washington, (1854); Wyoming, (1869); Wisconsin, (1856).

The New York Code has also served as a model for a number of the Federal Equity Rules of 1912, especially those dealing with the parties.

The various codes based on the

another, for the enforcement or protection of a right,[2] the redress or prevention of a wrong, or the punishment of a public offence.

New York Code, while varying more or less from the original, have in most instances preserved the substance, and frequently the language, of the more important provisions. Lack of space renders a comparison impracticable here, but a good summary will be found in Professor Hepburn's "Development of Code Pleading."

Pleading in the Federal Courts in actions at law is governed by the State Code under the terms of the Conformity Act, (Act of June 1, 1872, U. S. Rev. Stat. § 914, U. S. Comp. Stat. 1913 § 1537):

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the (circuit and) district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such (circuit or) district courts are held, any rule of court to the contrary notwithstanding."

Pleading in the Federal Courts in equity cases is governed by the Equity Rules of 1912, (198 Fed. Rep. — Appendix), adopted by the Supreme Court of the United States under the authority of U. S. Rev. Stat. § 917, U. S. Comp. Stat. § 1543.

2 "It is because rights exist and because they are sometimes violated, that remedies are necessary. The object of all remedies is the protection of rights. Rights are protected by means of actions or suits. The term "remedy" is applied either to the action or suit by means of which a right is protected, or to the protection which the action or suit affords. An action may protect a right in three ways, namely, by preventing the violation of it, by compelling a specific reparation of it when it has been violated, and by compelling a compensation in money for a violation of it. The term "remedy" is strictly applicable only to the second and third of these modes of protecting rights; for remedy literally means a cure,—not a prevention. As commonly used in law, however, it means prevention as well as cure; and it will be so used in this paper. In equity the term "relief" is commonly used instead of "remedy"; and though relief is a much more technical term than remedy, it has the advantage of being equally applicable to all the different modes of protecting rights.

"Though remedies, like rights, are either legal or equitable, yet the division of remedies into legal and equitable is not co-ordinate with the corresponding division of rights; for, though the remedies afforded for the protection of equitable rights are all equitable, the remedies afforded for the protection of legal rights may be either legal or equitable, or both." Langdell, Survey of Equity Jurisdiction, 1 Harvard Law Rev. 111.

§ 3334. Every other prosecution by a party, for either of the purposes specified in the last section, is a special proceeding.

SECTION 1. SPLITTING AND CONSOLIDATION OF DEMANDS.[3]

SECOR v. STURGIS.

Court of Appeals of New York, 1858. 16 N. Y. 548.

This was an action on a bond given to obtain the release of

[3] The Code contains the following provisions for the joinder of distinct causes of action in one complaint:

"Where the complaint sets forth two or more causes of action, the statement of the facts constituting each cause of action must be separate and numbered."—N. Y. Code Civ. Proc., Sec. 483.

"The plaintiff may unite in the same complaint, two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows:

1. Upon contract, express or implied.
2. For personal injuries, except libel, slander, criminal conversation or seduction.
3. For libel or slander.
4. For injuries to real property.
5. Real property, in ejectment, with or without damages for the withholding thereof.
6. For injuries to personal property.
7. Chattels, with or without damage for the taking and detention thereof.
8. Upon claims against a trustee, by virtue of a contract, or by operation of law.
9. Upon claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.
10. For penalties incurred under the fisheries, game and forest law.

But it must appear, upon the face of the complaint, that all the causes of action, so united, belong to one of the foregoing subdivisions of this section; that they are consistent with each other; and, except as otherwise prescribed by law, that they affect all the parties to the action; and it must appear upon the face of the complaint, that they do not require different places of trial."—N. Y. Code Civ. Proc., Sec. 484.

The problem presented in this section, however, is not what causes of action may be joined under the foregoing provision, a matter treated hereafter in the chapter on the complaint, but rather what make up a single cause of action within the rule against splitting an indivisible demand, and what demands, though possibly severable, may be embraced as items of damage or otherwise, in what may be treated as one cause of action.—Ed.

a vessel from an attachment issued in favor of the plaintiffs on an account for materials and supplies. The complaint alleged that the sum of $521.15 was due plaintiffs for materials in repairing and equipping the vessel, and the nonpayment of the same as a breach of the conditions of the bond. The answer set up a former recovery for the same matters in the U. S. District Court. The evidence taken before a referee showed that the plaintiffs carried on the business of ship carpenters and also that of ship chandlers, and that separate accounts were kept and separate bills rendered in each branch of the business. That the attachment was brought on the account for supplies furnished from the ship-chandlery branch of the business, and that the former recovery was based on an account for labor and material furnished by the ship-carpentery branch. Judgment was entered on the report in favor of the plaintiffs, and the defendants appealed.[4]

STRONG, J. It is not controverted that the account, the amount of which is sought to be recovered in this action, was due to the plaintiffs, and a lien on the vessel, at the time of the application for the attachment, and also at the time of the execution of the bond on which this action is founded; but it is insisted that the said account, and the account for which judgment was recovered in the district court of the United States, together, constituted a single cause of action, and that the judgment for part of it is a bar to a recovery in this action for the residue. The answer does not in express terms, allege that the cause of action in the suit in the district court was the same as that in the present suit, but it was treated in the reply as containing substantially that allegation, and must therefore be so regarded by the court. It was essential, in order to present the question raised, that the identity of the cause of action in the different suits should, in some form, be averred in the answer. (3 Chit. Pl. 928-9; Phillips v. Berick, 16 Johns. 137, 140.)

The principle is settled beyond dispute that a judgment concludes the rights of parties in respect of the cause of action stated in the pleadings on which it is rendered, whether the suit embraces the whole or only part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim, arising either upon a

[4] Statement condensed and parts of the opinion omitted.

contract or from a wrong, cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such a claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in the other suits. (Farrington v. Payne, 15 John. 432; Smith v. Jones, id. 229; Philips v. Berick, 16 Id. 137; Miller v. Covert, 1 Wend. 487; Guernsey v. Carver, 8 id. 492; Stevens v. Lockwood, 13 id. 644; Colvin v. Corwin, 15 id. 557; Bendernagle v. Cocks, 19 id. 207, and cases there cited.) But it is entire claims only which cannot be divided within this rule, those which are single and indivisible in their nature. The cause of action in the different suits must be the same. The rule does not prevent, nor is there any principle which precludes, the prosecution of several actions upon several causes of action. The holder of several promissory notes may maintain an action on each; a party upon whose person or property successive distinct trepasses have been committed may bring a separate suit for every trepass; and all demands, of whatever nature, arising out of separate and distinct transactions, may be sued upon separately. It makes no difference that the causes of action might be united in a single suit; the right of the party in whose favor they exist to separate suits is not affected by that circumstance, except that in proper cases, for the prevention of vexation and oppression, the court will enforce a consolidation of the actions.

It is not, as will be seen by the cases, always easy to determine whether separate items of claim constitute a single or seperate cause of action; and this difficulty, connected with neglect, in some instances, of proper attention to the principle of the rule under consideration, has led to some loose expressions and confusion in the books on this subject. Farrington v. Payne was a plain case of an indivisible cause of action. A bed and bed quilts were taken at the same time, and by the same act, and a recovery in trover for the quilts was held a bar to a recovery in trover for the bed. In Smith v. Jones, actions were brought for goods sold and delivered, the plaintiff, in one, claiming to recover for one barrel of potatoes, and in the other for two barrels of the same article, all sold at the same time. The court held that the demand could not be divided into separate suits. This was also a plain case of one cause of action. Miller v. Covert, in which the same rule was applied, was a case of a sale

of hay, under a contract, delivered in parcels. The demand was held to be entire and indivisible.

In Guernsey v. Carver, the plaintiff declared on a book account consisting of items of merchandise delivered between the 20th of July and the 27th of August, 1828, amounting to $2.35. The defendant pleaded a former suit for the same identical cause and causes of action. It was proved in the Common Pleas that the plaintiff had an account against the defendant, consisting of twenty different articles of merchandise, delivered on fourteen different days between the 4th of June and the 27th of August, 1828, amounting to between $5 and $6; that he commenced a suit against the defendant, and exhibited an account of items delivered between the first of June, and the 19th of July, 1828, amounting to $2.74, that the defendant pleaded a tender in such suit, and obtained judgment for costs. The plaintiff then sued for the balance of such account, viz., for items delivered between the 20th of July and the 27th of August. The common pleas decided that on a running account, where no special contract was made at the commencement of the account, and where items have been delivered on such account at different times, without any intermediate agreement, each separate delivery formed a separate and distinct cause of action, and that separate suits might be maintained on each separate delivery; and the plaintiff recovered judgment. On appeal to the supreme court the judgment was reversed. The court, by Nelson, J., after stating that it was settled in that court that if a plaintiff bring an action for a part only of an entire and indivisible demand, the judgment in that action is a conclusive bar to a subsequent suit for another part of the same demand, says: "This case comes within the reason and spirit of that principle. The whole account being due when the first suit was brought, it should be viewed in the light of an entire demand, incapable of division, for the purpose of prosecution. The law abhors a multiplicity of suits. According to the doctrine of the court below, a suit might be sustained, after the whole became due, on each separate item delivered, and if any division of the account is allowable it must no doubt be carried to that extent. Such a doctrine would encourage intolerable oppression upon debtors, and be a just reproach upon the law. The only just and safe rule is to compel the plaintiff, on an account like the present, to include the whole of it due

in a single suit." The reasoning of the learned justice would make every account consisting of different items, the whole of which is due, an entire demand incapable of division for the purpose of prosecution irrespective of every other consideration. It excludes the idea that it is necessary the claims should have arisen out of a single transaction, or be connected together by contract. This, in my opinion, is carrying the doctrine in question far beyond its just limits. Stevens v. Lockwood was a case similar to the last, and decided upon similar views. These cases may have been rightly decided, but I cannot assent to all the reasons given for the decisions.

In Colvin v. Corwin, two suits were brought for lottery tickets sold the defendant. On the trial of the first the defendant admitted he had bought the tickets alleged to have sold to him, and judgment was rendered for the plaintiff. The judgment was set up as a bar in the second suit, and on the trial it appeared that the tickets claimed in the suits were delivered to the defendant by two different agents of the plaintiff, at different offices occupied by them, at different times, and it was held by the Supreme Court that the previous judgment was a bar to a recovery. It is manifest that this decision rests on no sound principle, and it is not law. A plainer case of distinct independent causes of action could hardly be presented. * * *

The true distinction between demands or rights of action which are single and entire, and those which are several and distinct is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. Perhaps as simple and safe a test as the subject admits of, by which to determine whether a case belongs to one class or the other, is by inquiring whether it rests upon one or several acts or agreements. In the case of torts, each trespass, or conversion, or fraud, gives a right of action, and but a single one, however numerous the items of wrong or damage may be; in respect to contracts, express or implied, each contract affords one and only one cause of action. The case of a contract containing several stipulations to be performed at different times is no exception; although an action may be maintained upon each stipulation as it is broken, before the time for the performance of the others, the ground of action is the stipulation which is in the nature of a several contract. Where there is an account for goods sold, or labor performed, where money has been lent to

or paid for the use of a party at different times, or several items of claim spring in any way from contract, whether one only or separate rights of action exist, will, in each case, depend upon whether the case is covered by one or by separate contracts. The several items may have their origin in one contract, as on an agreement to sell and deliver goods, or perform work, or advance money; and usually, in the case of a running account, it may be fairly implied that it is in pursuance of an agreement that an account may be opened and continued, either for a definite period or at the pleasure of one or both of the parties. But there must be either an express contract, or the circumstances must be such as to raise an implied contract, embracing all the items, to make them, where they arise at different times, a single or entire demand or cause of action.

Applying this test to the present case, it is very clear that the two accounts did not constitute an entire claim; but, on the contrary, that they were several and formed two several causes of action. The business of the plaintiffs consisted of two branches, which were designed to be and were kept entirely distinct, in each of which one of the accounts was made, and an arrangement was entered into under which one of the accounts arose anterior to the opening of the other account. Here was no express contract connecting the two accounts; and the facts, instead of warranting the presumption of such a contract, show that separate agreements only, one in regard to each account, were intended.[5] * * *

Judgment affirmed.

BOYCE v. CHRISTY.

Supreme Court of Missouri, 1870. 47 Mo. 70.

BLISS, JUDGE, delivered the opinion of the court.

The plaintiff, formerly an apprentice of defendant, some six years after he had arrived at majority, brought suit upon the indenture. The statute only allows such suits to be brought

[5] For a collection of the later cases on this point, see Williams-Abbott Electric Co. v. Model Electric Co., 134 Ia. 665, 13 L. R. A. (N. S.) 529, (1907), annotated.

within two years after the apprentice comes of age, and for that reason the petition was demurrable; for it is well settled that when the statute creates a bar by lapse of time, and the petition shows that the time has elapsed, the defense may be made by demurrer. (State v. Bird, 22 Mo. 470; McNair v. Lott, 25 Mo. 182; Van Hook v. Whitlock, 7 Paige, 373.) But the defendant failed to avail himself of the statute, either by demurrer or answer, and this being an action upon contract, its benefit was waived. (Benoist v. Darby, 12 Mo. 196; Sturgis v. Benton, 8 O. St. 215; Ang. Lim. § 285.)

The petition counts upon the indenture and charges various breaches in the form of independent counts, and the plaintiff obtained a general verdict of $400, upon which judgment was rendered. Under our system such general verdict is erroneous, and judgment should have been arrested. Each count calls for a separate judgment, and the rule under common law pleadings cannot apply to petitions under our statute. (Mooney v. Kennett, 19 Mo. 551; Clark's Admx. v. Hann. & St. J. R. R., 36 Mo. 202; Pitts v. Fugates, Adm'x, 41 Mo. 405; State v. Dulle, 45 Mo. 269.)

The plaintiff asks that the petition be treated as containing but one count, notwithstanding its form, inasmuch as the indenture was but a single contract. We might, perhaps, get over the form if there were really but one cause of action in the petition. But the breaches were separate and distinct; one charging a neglect in sending the apprentice to school; another in paying him money; others in other things. Their investigation involved separate and independent inquiries and findings on the part of the jury, and they should be held to be independent causes of action, although arising out of the same contract. The authorities upon this point are not altogether uniform, although there is a preponderance in favor of our view. The State v. Davis, 35 Mo. 406, was an action upon a sheriff's bond, and the court held that the various breaches constituted but one cause of action. This point in the case was not noted in our only digest, and its decision failed to be considered by us when the question was subsequently raised. In Howard v. Clark, 43 Mo. 347, and in the State v. Dulle, 45 Mo. 271, the opposite view is held, and seems to us to be well founded.

The other judges concurring, the judgment is reversed and the cause is remanded.

BURRITT v. BELFY.

Supreme Court of Connecticut, 1879. 47 Conn. 323.

LOOMIS, J.[6] Under a parol lease for a term of years, the defendant, from the 1st of October, 1875, till the 1st of November, 1877, occupied certain real estate belonging to the plaintiff for an agreed rent of thirty-seven dollars and fifty cents per month, payable monthly in advance. The rent was not paid according to agreement, and on the 31st of October, 1877, there was due the plaintiff the sum of $173.63, and on that day the present suit was commenced, returnable to the City Court of the city of Waterbury holden on the first Monday of December, 1877, for the purpose of recovering the rent due prior to the 1st of October, 1877. On the 1st day of November, 1877, the plaintiff commenced another suit, returnable before a justice of the peace on the 10th day of November, 1877, to recover for the rent due for the month of October, 1877. Both actions were general *assumpsit*[7] for use and occupation only, and all the rent was due when the first suit was brought. The justice suit was first tried, in which the plaintiff filed his bill of particulars for "one month's rent from October 1st, 1877, to November 1st, 1877, $37.50," and recovered judgment for the amount claimed, with costs, which was paid and satisfied by the defendant after execution was issued.

In the present action the plaintiff filed his bill of particulars for "twenty-four months' rent up to October 1st, 1877, at $37.50 per month," giving credit for the amount received, and showing a balance of $136.13.

The defendant pleaded the general issue, with notice that the recovery and satisfaction of the judgment before the justice upon a part of the same cause of action would be claimed as a bar to this action.

The City Court decided that it was no bar and the ruling was sustained by the Superior Court. The question comes before this court for review on the defendant's motion in error.

The legal proposition that a judgment for a part of one en-

6 Statement and parts of opinion omitted.

7 This action was brought before the adoption of the code, but it would seem that the code does not affect the question involved.

tire demand is a conclusive bar to any other suit for another part of the same demand is everywhere inflexibly maintained.

There are some cases of great hardship where this court has applied the principle, showing how firmly it has been adhered to. * * *

In the case at bar it is manifest that an action might have been brought for each month's rent as it became due, and so far the cause of action would have been several.[8] But after all the payments have become due and the consideration is executed, in determining whether the cause of action is single and entire or several, regard should be had to the obligation of the defendant under the contract at the time the action is brought. If there are several payments due under one and the same contract they then become consolidated, as one obligation on the part of the defendant and one demand on the part of the plaintiff. So that if this action was founded on the express contract, we should hold that all the payments due should be included in one action. But here the action is not predicated on the promise to pay monthly and the breaches of that promise, but simply on the implied contract arising from the use and occupation, which was one continuous and entire thing. There is only one promise founded on one consideration, and there is *unum debitum*, one debt, which the defendant owes. So that the demand is clearly single and entire within all the authorities, and the plaintiff had no right to split it up for the purpose of bringing several actions, and having done so the first valid judgment on the merits for a part of the claim became an effectual bar to this action for the residue.

The result of the plaintiff's attempt to split his cause of action will be the loss of the principal part of his debt, which is to be regretted. But the law ceases to be law, it ceases to promote justice, if it is changed for every case. The greatest good to the greatest number requires a firm adherence to just general principles. Should we concede to the plaintiff in this case the right he claims to maintain these two suits, it would of necessity concede also his right to split his cause of action into twenty-five parts, one for each month's occupancy. Such a re-

[8] Compare Pakas v. Hollingshead, 184, N. Y., 211 (1906), to the effect that successive actions cannot be maintained on a contract to deliver property in installments.

sult would be simply intolerable. The two old maxims of the law on which our decision rests, *"Nemo debet bis vexari pro eadem causa,"* and *"Interest reipublicae ut sit finis litium,"* are embodiments of wisdom and justice. * * *

Again, as the defendant might have pleaded the pendency of the first suit in abatement of the second, it is suggested whether his omission to do so may not be considered a waiver of his right to plead the matter in bar.

The rule in law on which we base our decision is in the interest of the debtor and may undoubtedly be waived by him.

It was held in Mills v. Garrison, 3 Keyes, 40, that it might be waived by an agreement for that purpose. But in this case there is no ground of waiver at all, unless it is the omission to plead the pendency of the first suit in abatement. We do not see how this can waive anything except what is involved in the order of pleading; and a neglect to plead in abatement surely waives no legitimate matter in bar. Marble v. Keyes, 9 Gray, 221.

There was error in the judgment complained of and it is reversed.

COMMISSIONERS OF BARTON CO. v. PLUMB.

Supreme Court of Kansas, 1878. 20 Kan. 147.

VALENTINE, J. This was an action brought in Lyon County by the board of county commissioners of Barton county against P. B. Plumb and W. T. Soden on a certain penal bond executed by them. The petition below sets forth and alleges among other things the following facts: Said bond was executed by John McDonald as principal, and P. B. Plumb and W. T. Soden as sureties, and bound said McDonald, Plumb, and Soden unto said county of Barton in the penal sum of fifty thousand dollars, to be void however upon the condition that said McDonald should comply with all the terms of a certain written contract previously entered into between him and said board of county commissioners, whereby he agreed, for the consideration of $24,200 to furnish all the material and build a certain court house within a certain time in said county of Barton. The petition also alleges that the county on its part complied with the

terms and conditions of said bond and said contract, but that McDonald did not comply on his part with all the terms of said contract. In great detail it alleges that he did not complete said building within the time agreed upon by the parties, nor at any other time; that he did not furnish sufficient material therefor, and that, although he furnished some of the material therefor, and did some of the work thereon, yet that said material and said work were of an inferior quality, and were not such as were required by the terms of said written contract. The petition also alleges certain other facts tending to show the amount of the damages which resulted to the plaintiff from the non-compliance of McDonald with said contract, and then asks for a judgment for the plaintiff for $12,000 damages, and costs of suit. The defendants moved "the court to require the plaintiff to separately state and number the several causes of action contained in plaintiff's petition"—but they did not state or show how many or what causes of action they claimed were contained in the plaintiff's petition. The court sustained this motion; but the court was equally silent as to the number or kinds or causes of action it considered were contained in plaintiff's petition. The plaintiff failed to amend said petition in any manner whatever, and for that reason the court dismissed the action. The plaintiff assigns said rulings of the court below as error.

If the petition did in fact state more than one cause of action, as is claimed by the defendants, then the rulings of the court below were correct; but if it really stated only one cause of action, as is claimed by the plaintiff, then said rulings of the court below were evidently erroneous. We think the petition really stated only one cause of action. Houston v. Delahay, 14 Kan. 125, 130. (See also as throwing some light upon this question, the following cases, to-wit: Hibbard v. McKindley, 28 Ill. 240; State v. Davis, 35 Mo. 406; Fisk v. Tank, 12 Wis. 276, 298, 299; Roehing v. Huebschman, 35 Wis. 185, 187; Smith v. B. C. & M. Rld., 36 N. H. 458, 484; K. C. Hotel Co. v. Sigement, 53 Mo. 176, 177.) The defendants by executing the penal bond set forth in the petition, agreed and guaranteed in substance, that McDonald should build said court house as he agreed to do; but McDonald failed. And this is what constitutes the plaintiff's cause of action, and we think it constitutes only one cause of action. It is true, that McDonald did not wholly fail. He built a court-house or a part of a court-house; but he did not

build the kind and quality of court-house which the parties agreed should be built; and evidently, his partial failure to build said court-house, his failure in some of the innumerable particulars in building the same, would not constitute a greater number of causes of action than a total failure to build such court-house, a total failure in every particular. Even if this action should be governed by the same principles which would govern in an action brought by plaintiff against McDonald on his original contract to build said court-house, we would still think that the same result would follow, and that the facts of the case would constitute only one cause of action. McDonald simply agreed that on or before the 25th of December, 1873, he would furnish to the plaintiff, and at Great Bend, a certain kind and quality of court-house, completed and finished. He did not agree that he would furnish materials, *as materials,* or labor *as labor.* All that he agreed to do with reference to furnishing materials or labor was that he would furnish them *in a court-house, and as a part of the court-house.* Under said contract it was his legal duty to furnish said materials and labor in said court-house, and not otherwise; and the plaintiff had a legal right to receive them in such court-house, and not in any other manner. That is, it was the legal duty of McDonald to furnish to the plaintiff said court-house as he agreed to do, and the plaintiff had a legal right to so require it. McDonald violated this right by not so furnishing said court-house. And this is just what constitutes the plaintiff's cause of action against McDonald on said contract. That is, the plaintiff's cause of action is founded on the *right* of the plaintiff to receive said court-house from McDonald according to said contract, and the *violation* of such right by McDonald. The failure on the part of McDonald to furnish materials or labor was no violation of any right of the plaintiff, except as he failed to furnish them *in the building and as a part thereof.* The materials and labor when furnished would not belong to the plaintiff until they were put into the building. Prior to that time they would belong to McDonald. He could bring materials onto the ground, and then take them away if he chose. He could put them into the building, or not, just as he chose. And after completing the building, (if he had done so) he could take away all the materials not used in the construction of the building. The plaintiff never did own nor could own under said contract any part of the

materials furnished by McDonald, except as it owned them as parts and portions of said court-house building. From the foregoing, it will be seen that the plaintiff possessed one grand primary right, and only one such right, and that that right was to have a good court-house built according to said contract. Within this grand primary right, however, there existed innumerable subordinate and secondary rights. These subordinate and secondary rights reached to all the illimitable details in the construction of said building. Thus, the plaintiff had a right to have every brick of proper quality, and put into the building in a proper manner. So also with respect to every piece of lumber, pane of glass, nail, lock, hinge, etc. Now each of these innumerable subordinate rights might be violated, and the violation of any one of them would constitute a cause of action. Thus, if McDonald had put a broken or crooked pane of glass into a window, instead of putting in a good one, or had not puttied it in well, the plaintiff would have had a cause of action against him for the resulting damages. The same thing may be said with respect to putting a brick in the wall, or a piece of tin on the roof, or a board in the floor. And so on through all the limitless details in constructing the building. But the violation of each of these special and subordinate rights is also a violation of the more general and primary right, and altogether they constitute only one violation of this grand primary right. Now as the violation of any one of these subordinate rights would constitute a cause of action, it might seem that the violation of a hundred or a thousand of such subordinate rights would constitute a hundred or a thousand separate and distinct causes of action. But such is not the case, or at most it is rarely the case. Possibly the plaintiff might in some cases be allowed to elect whether he would treat the several violations of his several subordinate rights as separate and distinct causes of action, or as only one cause of action, but generally he would not be allowed to do so. Generally he would not be allowed to split up into several causes of action what he might prosecute as only one cause of action. In the present case we think that all the violations of the plaintiff's subordinate rights under said contract really constitute only one general violation of its general and primary right under said contract, and therefore that all

of such violations really constitute only one cause of action.[9] All of said violations taken together were merely a violation of the plaintiff's general right to have said court-house built according to contract. McDonald was to be paid $24,200 in installments, upon estimates made as work progressed; but it was expressly stipulated that "no payment or estimate shall be considered as acceptance of all or any part of the work; *and no acceptance shall be conclusive and final until the entire completion and acceptance of the work.*" When McDonald adandoned the work, on 20th January, 1874, the plaintiff's cause of action was complete. The fact that the plaintiff afterward proceeded with the work, and completed the building, did not give to the plaintiff another or an additional cause of action. The necessary cost of completing the building may however be shown in the case for the purpose of measuring the plaintiff's damages.

There are several other facts alleged in the plaintiff's petition, which do not go to make up or constitute the plaintiff's *cause* of action, but are alleged merely for the purpose of giving a measure for the plaintiff's damages, or special damages which have resulted from wrongs constituting the plaintiff's *cause* of action.

The judgment of the court below will be reversed, and the cause remanded with the order that said order of dismissal, and said order requiring the plaintiff to separately state and number the several causes of action contained in the plaintiff's petition, be set aside, and that further proceedings be had in the case in accordance with this opinion.

MILLARD v. MISSOURI, KANSAS & TEXAS R. R. CO.

Court of Appeals of New York, 1881. 86 N. Y. 441.

Appeal from judgment of the general term of the supreme court, in the second judicial department, entered upon an order

9 Accord: Fisk v. Tank, 12 Wis. 307; Nichols v. Alexander, 28 Wis. 118 (several breaches of covenant); State v. Davis, 35 Mo. 406. (Several breaches of a penal bond); Rissler v. Ins. Co., 150 Mo. 366 (insurance policy where the total was apportioned to different articles).

made Feb. 10, 1880, which affirmed a judgment in favor of the plaintiff, entered upon a verdict. (Reported Below, 20 Hun. 191.)

This action was brought to recover for the loss of certain merchandise, while being transported on defendant's road.

The facts proved were substantially these:

On the 30th of April, 1873, the plaintiff and one William Brady purchased tickets and took passage on the defendant's road at St. Louis, Mo., for Dennison, Tex. Plaintiff had with him a valise, containing his wearing apparel and articles known as baggage, and a packing box or trunk, containing merchandise. Brady had with him one trunk, containing his personal baggage, and two packing boxes, or trunks, containing merchandise. The tickets entitled the plaintiff and Mr. Brady to carry a certain amount of baggage without extra compensation. The defendant's agent at St. Louis, on being advised of their contents, refused to put the packing boxes aboard the train, and insisted that they should be sent as freight. The plaintiff explained to him the nature of their contents, and that it was important that they should go on the train with them; and thereupon the agent weighed them together with the baggage, and charged $8 or $10 for carrying the packing boxes, which plaintiff and Mr. Brady paid, and they were then put aboard the train with the baggage; all were destroyed by fire on the following day, while in defendant's possession, and during the journey, Mr. Brady assigned his claims against the defendant to the plaintiff, and in 1873 the latter brought an action to recover the value of the baggage so lost; he recovered judgment in said action, which was paid. A bill of particulars was served in that action which contained the items of merchandise contained in the packing boxes as well as the baggage; the court, however, ruled upon the trial that nothing but the personal baggage could be recovered for in that action, as the complaint did not allege the contract to convey the merchandise, and that the goods now in suit did not come within the term "baggage," and accordingly excluded proof in regard to the same; and plaintiff withdrew all claims for such merchandise.

EARL, J. The claim is made on the part of the appellant, that the rule, that where a party brings an action for a part only of an entire, indivisible demand, and recovers judgment, he cannot subsequently maintain an action for another part of the same

demand, was violated in the judgment rendered in this action.

The facts, as the trial judge found them, or may be presumed in support of the judgment to have found them, are as follows: There were two contracts made with each, the plaintiff and his assignor, one with each to carry him and his baggage, and the other subsequently made to carry the chattels contained in his trunk.

It was decided in the prior action that that was based solely upon the contract to carry the passengers and their baggage. The recovery was there limited to such baggage, and it was held that the contracts alleged did not cover the chattels involved in this action.

This action is based upon separate contracts to carry the chattels which were not properly baggage, and which were contained in the trunks. It was manifestly in reference to such chattels that the extra compensation was demanded by the defendant and separate contracts thus made.

The former recovery does not, therefore, bar this action. A single demand was not divided in violation of the rule above referred to. (Stoneman v. Erie R. R. Co., 52 N. Y. 429; Sloman v. Great Western R. R. Co., 67 id. 208.) And this result follows although the plaintiff in the former action recovered for the trunks in which the chattels here in question were packed, because such recovery was had, perhaps erroneously, under the contracts there alleged, and not under the contracts alleged in this action.

The judgment should be affirmed, with costs.[10]

VAN HOOZIER v. HANNIBAL & ST. JOSEPH R. R. CO.

Supreme Court of Missouri, 1879. 70 Mo. 145.

HOUGH, J.[1] This is an action for damages arising from the diversion, by the defendant, in 1873, of a stream of running water, whereby portions of the plaintiff's land were, in the year 1875, overflowed and rendered unfit for cultivation, his crops

10 See also Townsley v. Niagara Ins. Co., 218 N. Y. 228 (1916).

1 Part of the case omitted.

destroyed and his timber injured. The defendant pleaded not guilty and a former recovery. There was a verdict and judgment for the plaintiff under the plea of former recovery. The defendant introduced in evidence the pleadings in a suit for damages, instituted by the plaintiff against it in 1875, together with the instructions of the court, the verdict of the jury, and the judgment of the court thereon in favor of the plaintiff. It was then admitted by the parties "that the land injured is the same in both suits, that the parties plaintiff and defendant are the same, that the cause of the injury is the same, and the cause of the injury, defendant's railroad and plaintiff's land are all in the same condition as at the commencement of this suit, the judgment in which is pleaded in bar of this action, the only difference being that said former suit was prosecuted for damages during the years 1873 and 1874, while the present suit is for damages during the year 1875, and since the institution of the prior suit and to the institution of the present suit." By agreement of the parties, the plea of former recovery was first tried before the court, the defendant claiming that the cause of the injury, for which the former judgment was recovered was of a permanent character, and that the entire damages, both for past and future injuries, resulting therefrom, could and should have been recovered in that suit, and that the judgment therein was, therefore, a bar to the present action.

In cases of nuisance the rule is well settled that the plaintiff cannot recover for injuries not sustained when his action is commenced. It is equally well settled that when the injury inflicted is of a permanent character and goes to the entire value of the estate, the whole injury is suffered at once, and a recovery should be had, therefore, in a single suit, and no subsequent action can be maintained for the continuance of such injury. But when the wrong done does not involve the entire destruction of the estate, or its beneficial use, but may be apportioned from time to time, separate actions must be brought to recover the damages so sustained, and former suit will be no bar to a recovery in another action for damages suffered subsequent to the institution of the first suit. The town of Troy v. Cheshire R. R. Co., 3 Foster 83; Cheshire Turnpike Co. v. Stevens, 13 N. H. 8; Wood on Nuis., § 856; Pinney v. Berry, 61 Mo. 367. The lands in question lie north of the defendant's railroad, and the stream diverted originally flowed along and a few rods south of

said road. The defendant erected a dam or embankment across the channel of the stream and made a ditch or culvert in the road bed through which the water of the stream was conducted upon the plaintiff's land. Portions of these lands were annually cultivated after the nuisance was levied, and the crops thereon annually injured, so that it is patent that the injury thereby inflicted did not go to the entire value of the estate, but was of yearly recurrence and varied in extent with the volume of water discharged upon the land. Such being the facts, it is plain that the injury is a continuous one, susceptible of periodical apportionment, and, therefore, capable of being redressed by successive actions. It follows from these views that the court committed no error in overruling the plea of former recovery. * * *

* * * The other judges concurring the judgment of the circuit court will be affirmed.[2]

HUESTON v. MISSISSIPPI BOOM COMPANY.

Supreme Court of Minnesota, 1899. 76 Minn. 251.

MITCHELL, J. In 1897 the plaintiff, as vendee under an executory contract of sale, was in the possession of a tract of land in Anoka county bordering on the Mississippi river, a tributary of which, called "Rice Creek," ran through the land. On this creek there was a mill for grinding flour and feed, operated by water power furnished by the creek. The mill had been operated by the plaintiff for some years, and had an established line of custom. About six acres of plaintiff's land near the river were used and were especially adapted for pasturage. The balance of the land was used in connection with the mill and the dam. About five-eights of a mile below plaintiff's land there was an island in the Mississippi river, about half a mile long. Prior to 1897 the defendant built a boom from this island to the

[2] For a case of successive actions for damage from the caving in of the surface caused by prior mining operations. See Mitchell v. Darley Colliery Co. L. R., 14 Q. B. D. 125, (1885).

For an extensive collection of the nuisance cases, see City of Ottumwa v. Nicholson, L. R. A. 1916 E. 983, (1913), annotated.

east bank of the river, and had established there its assorting gap for the purpose of distributing logs to the mills of Minneapolis. The defendant had also put in a line of piling from the upper end of the island to the west bank of the river, for the purpose of running logs into the boom. As a result of the erection and maintenance of these works, about the 1st of April, 1897, a large log jam was formed, which caused the water to overflow plaintiff's land, and come up into his mill, so as to injure it, and prevent him from operating it for some nine days. About the first of July, another jam occurred from the same cause, which again flooded plaintiff's land and mill, resulting in further damage to, and loss of the use of, the mill, and destroying and killing the grass on the pasture land to such an extent that it would require one or two years to restore it. Another consequence of this overflow was that when it receded it left sand and other debris on the pasture land. There is really no controversy but that the construction and maintenance of defendant's works caused these overflows, and consequent damage to plaintiff's premises. * * *

The complaint alleged generally the unlawful construction and maintenance of defendant's works, and the consequent injury to plaintiff's premises in 1897; and upon the trial he was permitted, against the objection of the defendant, to introduce evidence of the overflow and consequent damage, both in April and in July. There is nothing in the point that there were two separate and distinct causes of action, which ought to have been pleaded as such. It was in the nature of a continuing trespass[3] by the same act, although resulting in actual damage on two different occasions. * * *

Judgment affirmed.

[3] **Brace, P. J.** In Darby v. Mo. Kan. & Texas R. R. Co., 156 Mo. 391: * * * "The wrong complained of and proven in this cause, was the failure of defendant to maintain its fence as required by the statute during the period aforesaid. The damages proven was the injury to plaintiff's crop of corn by incursions of hogs at divers times during that season. The damage was continuous with the wrong, not susceptible of division, either as to quantum or date, and the court did not err in permitting a recovery of the whole damage in one count. (Steiglider v. Mo. Pac. Ry. Co., 38 Mo. App. 511)."

REILLY v. SICILIAN ASPHALT PAVING CO.

Court of Appeals of New York, 1902. 170 N. Y. 40.

CULLEN, J. The appellant claimed that while driving in Central Park, in the city of New York, both his person and his vehicle were injured in consequence of collision with a gravel heap placed on the road through the negligence of the defendant. Thereupon he brought an action against the defendant in the court of common pleas to recover damages for the injury to his person. Subsequently he brought another action in one of the district courts of the city of New York to recover for the injury to his vehicle. In this last action he obtained judgment which was paid by the defendant. Thereafter the defendant set up by supplemental answer the judgment in the district court suit and its satisfaction as a bar to the further maintenance of the action in the common pleas. On the trial of the case in the supreme court, to which, under the constitution, the action was transferred, it was held that the plaintiff's right of action was merged in the judgment recovered in the district court, and his complaint was dismissed. The judgment entered upon this direction was affirmed by the appellate division, and an appeal has been taken to this court by allowance. The rule is that a single or entire cause of action cannot be subdivided into several claims, and separate actions maintained thereon. Secor v. Sturgis, 16 N. Y. 548; Nathans v. Hope, 77 N. Y. 420. As to this principle there is no dispute. Therefore the question presented by his appeal is whether, from the defendant's negligence, and the injury occasioned thereby to the plaintiff in his person and his property, there arose a single cause of action, or two causes of action, one for the injury to his person, and the other for injury to his property. The question is not determined by the code of civil procedure, for, though in section 484 it prescribes what separate causes of action may be joined in the same complaint, it nowhere assumes to define what is a single cause of action.[4]

[4] The definition of a cause of action most frequently quoted in the cases is that formulated by the late Professor Pomeroy in his work on Code Remedies. § 347:

"Every action is brought in order to obtain some particular result which we term the remedy, which the code calls the "relief", and which, when granted, is summed up and embodied in the judgment of the court. This re-

Nor is there any controlling decision of this court on the point. In Mulligan v. Ice Co., (affirmed without opinion) 109 N. Y. 657, 16 N. E. 684, the question discussed in the opinion of the

sult is not the "cause of action" as that term is used in the codes. It is true this final result, or rather the desire of obtaining it, is the primary motive which acts upon the will of the plaintiff and impels him to commence the proceeding, and in the metaphysical sense it can properly be called the cause of this action, but it certainly is not so in the legal sense of the phrase. This final result is the "object of the action" as that term is frequently used in the codes and in modern legal terminology. It was shown in the introduction that every remedial right arises out of an antecedent primary right and corresponding duty and a delict or breach of such primary right and duty by the person on whom the duty rests. Every judicial action must therefore involve the following elements: a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself. Every action, however complicated or however simple, must contain these essential elements. Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and as it is used in the codes of the several States. They are the legal cause or foundation whence the right of action springs, this right of action being identical with the "remedial right" as designated in my analysis." (Reprinted by permission of the Publishers, Messrs. Little, Brown & Co.)

It is unquestionably true that nearly all of the common law actions were based on a primary right in the plaintiff with a corresponding duty on the defendant, and a breach of that duty.

But this does not appear to be the case in all actions. For example, in the case of an action or suit for the partition of land between tenants in common, whether at law or in equity, the cause of action does not appear to embrace any elements of duty or breach. The right of action, i. e., the power or the ability to maintain the action, seems to result from the mere relation of tenants in common. So in case of an action or proceeding to probate a will, there is no question of duty or breach. The act of the testator, under proper formalities, gives rise to a power on the part of the legatees to obtain judicial action establishing the instrument. Perhaps no better definition of a right of action can by found than this by Cardozo, J., in Jacobus v. Colgate, 217 N. Y. 235: "The right to prosecute an action with effect." See also that by Spear, J., in B. & O. R. R. v. Larwille, 83 Ohio St. 108: "A cause of action is the fact or combination of facts which give rise to the right of action, the existence of which affords a party a right

learned court below, and necessarily involved in the decision of this court, was the effect of a release which the plaintiff asserted was intended to cover only the injuries to his property, but was fraudulently prepared so as to embrace his whole cause of action. The case is doubtless authority for the proposition that the voluntary settlement between the parties of a part of a claim does not satisfy or discharge the whole claim. But the principle that the parties may, by a voluntary agreement, sever or split up a single cause of action, though a plaintiff cannot of his own volition do the same, seems to be generally recognized even in those jurisdictions where the rule is held most firmly that a

to judicial interference in his behalf."

In Professor Pomeroy's definition it is not clear what is meant by a remedial duty, and it is to be regretted that the author left the expression without explanation.

In some cases a new duty seems to arise out of the commission of a wrong; for example, under the doctrine of waiver of tort, the owner of a converted chattel may elect to treat the converter as a purchaser and recover the value by an action of general assumpsit for goods sold and delivered. Probably in such cases there is a duty to pay, but it seems to be the same sort of a duty as that incurred by an actual purchaser, namely, a primary duty.

In the case of a common law debt, the primary duty was to pay at maturity, the breach of which may be thought of as creating a continuing duty to pay, which differs in that respect from the original duty. The same situation appears in the case of a bailee who fails to surrender the chattel on the termination of the bailment. Here again there is a new continuing duty to surrender. In the case of a tortious taking there is a striking difference between the original duty not to take and the new duty to surrender.

So, where courts of equity give specific performance or specific reparation there may well be a new continuing duty.

If it is meant that such duties are remedial in the sense that they are enforced by the judgment or decree, it is difficult to find any corresponding element in the case of most common law torts and breaches of executory contracts.

As neatly put by the Court of Queen's Bench in Clegg v. Deardon, 12 Ad. & El. (N. S.) 575: "There is a legal obligation to discontinue a trespass or remove a nuisance; but no such obligation upon a trespasser to replace what he has pulled down or destroyed on the lands of another, though he is liable in an action of trespass to compensate in damages for the loss sustained." Can the mere liability to a judgment for damages be thought of as a duty? The judgment itself, of course, creates a duty because it creates a debt. But until judgment there seems to be nothing but a power on the one side and a liability on the other, for there is clearly no duty to pay damages which have not been ascertained.

single tort gives rise to but a single cause of action. O'Beirne v. Lloyd, 43 N. Y. 248; Bliss v. Railroad Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504.

The question now before us has been the subject of conflicting decisions in different jurisdictions. In England it has been held by the court of appeal (Lord Coleridge, C. J., dissenting) that damages to the person and to property, though occasioned by the same wrongful act, give rise to different causes of action (Brunsden v. Humphrey, 14 Q. B. D. 141), while in Massachusetts, Minnesota and Missouri, the contrary doctrine has been declared: (Doran v. Cohen, 147 Mass. 342, 17 N. E. 647; King v. R. R. Co. [Minn.] 82 N. W. 1113, 50 L. R. A. 161, 81 Am. St. Rep. 238; Von Fragstein v. Windler, 2 Mo. App. 598.) The argument of those courts which maintain that an injury to person and property creates but a single cause of action is that, as the defendant's wrongful act was single, the cause of action must be single, and that the different injuries occasioned by it are merely items of damage proceeding from the same wrong, while that of the English court is that the negligent act of the defendant in itself constitutes no cause of action, and becomes an actionable wrong only out of the damage which it causes. "One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person." Brunsden v. Humphrey, *supra*. I doubt whether either argument is conclusive. If, where one person was driving the vehicle of another, both the driver and the vehicle were injured, there can be no doubt that two causes of action would arise—one in favor of the person injured, and the other in favor of the owner of the injured property. On the other hand, if both the horse and the vehicle, being the property of the same person, were injured, there would be but a single cause of action for the damage to both. If, while injury to the horse and vehicle of a person give rise to but a single cause of action, injury to the owner and vehicle gives rise to two causes of action, it must be because there is an essential difference betwen an injury to the person and an injury to property, that makes it impracticable, or at least very inconvenient, in the administration of justice, to blend the two. We think there is such a distinction. Different periods of limitation apply. The plaintiff's action for personal injuries is barred by the lapse of three years; that to the prop-

erty not till the lapse of six years. The plaintiff cannot assign his right of action for injury to his person, and it would abate and be lost by his death before the recovery of a verdict, and, if the defendant were a natural person, also by his death before that time. On the other hand, the right of action for injury to property is assignable and would survive the death of either party. It may be seized by creditors on a bill in equity (Hudson v. Plets, 11 Paige 180), and would pass to an assignee in bankruptcy. Possibly the difficulties arising from the difference in the periods of limitation and the difference in the rule of survival between a personal injury and a property injury might be obviated in practice by holding the statute a bar to that portion of the damages, a claim for which would have been outlawed had it been a separate cause of action, and by permitting, in case of death, the action to be revived so far as it relates to property. We do not see, however, how it would be practicable to deal with a case where the right of action for injury to the property had passed to an assignee in bankruptcy, or to a receiver on creditor's bill, without treating it as an independent cause of action. Though, as we have already said, section 484 of the code does not expressly determine the point in issue, still it is not without much force in the argument that the two injuries constitute separate causes of action. Under the old code of procedure, at the time of its original enactment injuries to person and injuries to property were separately classified as causes of action, and it was not permitted to join those of one class with those of another. Code Proc. § 167. By an amendment in 1852, injuries to persons and property were put in the same class. But by section 484 of the Code of Civil Procedure they are again placed in different classes, and cannot be united. If the plaintiff's cause of action is single, into what class does it fall? Is it for an injury to the person, which may be united with other causes of action for personal injuries, or is it for injury to property, which may be joined with claims of the same nature, or is it *sui generis,* a nondescript which must stand alone?

While some of the difficulties in the joinder of a claim for injury to the person and one for the injury to the property in one cause of action are created by our statutory enactments, the history of the common law shows that the distinction between torts to the person and torts to property has always obtained.

Lord Justice Bowen, in the Brunsden case, has pointed out that there is no authority in the books for the proposition that a recovery for trespass to the person is a bar to an action for trespass to goods, or *vice versa*. It is true that at common law the necessity of bringing two suits could, at the election of the plaintiff, be obviated in some cases, as, for instance, by declaring for trespass on the plaintiff's close, and alleging in aggravation thereof an assault upon his person. See Wat. Tresp, 205, 206. Still in such a case there would be but a single cause of action, to-wit, the trespass upon the close, and, if the defendant justified this trespass, it would be a complete defense to the action; the personal assault being merely a matter of aggravation. Carpenter v. Barber, 44 Vt. 441. Therefore, for reason of the great difference between the rules of law applicable to injuries of the person and those relating to injuries to property, we conclude that an injury to person and one to property, though resulting from the same tortious act, constitute different causes of action.

The judgment appealed from should be reversed and a new trial granted; costs to abide the event.[5]

CAHOON v. BANK OF UTICA.

Court of Appeals of New York, 1852. 7 N. Y. 486.

Demurrer to a complaint.—The allegations contained in it were, that on the fourth day of May 1846, Stephen W. Brown assigned to the defendant a bond and mortgage for $3000, belonging to him solely as collateral security for the payment of three promissory notes of $1000 each, two of which were made by Brown alone and one by Brown & Rossiter, a firm of which he was a partner, and one-half of which Rossiter was bound to pay; that the defendants had collected the mortgage, and that the moneys received on the collection after paying the amount

[5] For a collection of cases dealing with the causes of action arising from injuries to persons and property or to various kinds of property from the same act, see: King v. R. R. Co. 50 L. R. A. 161; Ochs v. Pub. Service Co., 36 L. R. A. (N. S.) 240; Underwriters' v. Traction Co., 51 L. R. A. (N. S.) 319; Ry. Co. v. Berkovitz, 169 Ky. 785 (1916); Jacobus v. Colgate, 217 N. Y. 235 (1916).

due upon the three notes, left a surplus in their hands of $89.52; that the plaintiffs on the thirtieth day of May 1846, received from Brown an assignment of all his estate and rights in action, and that shortly after and before the collection of the moneys on the bond and mortgage by the defendants, he died, and that there were no executors or administrators of his estate; that the defendants although requested by the plaintiffs had refused to pay them the surplus moneys received by them after the payment of the notes, and to deliver to them the notes. The judgment demanded was for payment of the $89.42, and that the defendants deliver to the plaintiffs the notes.

The defendants assigned as causes of demurrer: 1st. That several causes of action have been improperly united in said complaint; that is to say a cause of action for the recovery of a certain amount of money due by contract from the defendants, and a cause of action to procure the delivery to the said plaintiffs of certain promissory notes in the said complaint mentioned. * * * Plaintiff appealed from an order sustaining the demurrer.[6]

JOHNSON, J. The ground on which this case ought to be put is, that the complaint does not contain two causes of action. The claim is single. It stands substantially in the same position as if Brown himself were plaintiff. The gist of it is, that Brown had placed in the possession of the Bank of Utica a mortgage, the proceeds to be applied to pay three notes, one made by Brown & Rossiter and the others by Brown, and the surplus to be returned to him. His assignees now seek an account of the proceeds of the mortgage and of their disposition, and to have the balance paid over and the notes which are satisfied delivered up. It is no answer to say that the balance of moneys could have been recovered in an action for money had and received. It would none the less have been the proper foundation for a bill in equity. Suppose, instead of a single security transferred to secure debts to a single person, twenty different securities had been transferred to the bank to secure debts due to twenty different persons, does any one doubt that the remedy would be in equity? It is only because there is no dispute about the

[6] Statement condensed and the dissenting opinion of Jewett, J., to the effect that there were two causes of action which ought to have been separately stated, omitted.

amount due that there seems to be any room for mistake as to the character of the claim. If that remained to be ascertained it would be the clearest possible case for an account; and yet this case is not clearer than that before us. For surely the accidental circumstance of the absence of a dispute as to the amount, can hardly be deemed to alter the value of the party's right.

Considering this proposition to be established, it remains to say a few words in regard to the claim to have the notes delivered up. Whatsoever may be the case as to Brown's own notes, he had a clear interest to require possession of the note of Brown & Rossiter, in order to be able to use it as a voucher in stating an account with Rossiter, and therefore having extinguished it by his own means, he had also a clear right to have the note delivered up. It is in short a complaint by a debtor to have his obligation delivered up and canceled, and an account of the securities pledged for them, and payment of the overplus. That a claim so simple in its character, so well recognized and even familiar under the old practice in chancery, should be seriously regarded as two distinct causes of action requiring distinct modes of trial, and incapable of being joined in a single suit is quite as surprising as the doctrine itself if held to be well founded would be inconvenient.

Judgment reversed.

LATTIN v. McCARTY.

Court of Appeals of New York, 1869. 41 N. Y. 107.

Appeal by the plaintiff from a judgment of the General Term of the Supreme Court in the fifth district, affirming a judgment of the Special Term, sustaining a demurrer to the complaint. The demurrer was at first stricken out as frivolous at Special Term in the seventh district; but on appeal to the General Term, this was reversed (17 How., 140), and the demurrer then argued at the Special Term in the fifth district with the result already stated.

A deed of certain premises in the city of Auburn, was executed by E. Corning, to the defendant, Michael McCarty, at

the request of Stanford, who had purchased the premises of McCarty, and for the sole purpose of completing his (Stanford's) claim of title.

This deed was delivered to Stanford (and never to McCarty), with that intent, and, by Stanford deposited for record in the clerk's office.

At this time Stanford had mortgaged to Fitch & Griswold, who had foreclosed and conveyed to Lattin, the plaintiff, who had repaired the premises and put in a tenant.

McCarty somehow heard that there was a deed from Corning to him, recorded in the office; and he went to the tenant and bribed him to leave, took possession himself, now holds adversely to plaintiff, and claims to own the premises by virtue of that deed.

McCarty's former interest in the premises, was under a *contract* from Corning to him; and in selling out to Stanford he had only assigned the contract, and Stanford, thinking McCarty had *deeded* to him, originated the mistake in getting a deed and recording the deed from Corning to McCarty. These facts were set up in detail in the complaint.

The relief asked for by plaintiff is:

1st. Possession.

2d. A conveyance of McCarty's apparent title, by quit claim or otherwise, etc., and that he be forever barred from setting up or asserting his pretended title.

McCarty's demurrer is on the ground:

1st. That the complaint does not set out facts sufficient to constitute a cause of action.

2d. That there is a defect of parties defendants.

3d. That several separate and distinct causes of actions have been improperly united.

HUNT, CH. J. The demurrer of the defendant, McCarty, was sustained, on the ground that inconsistent causes of action were included in the complaint. This decision was erroneous.

1. The complaint contains but a single cause of action, to-wit:—For relief against the deed under which McCarty fraudulently obtained possession. It is quite true that while the purpose of the complaint is single, it seeks to accomplish that result by several operations. It seeks to have the fraudulent deed set aside, and when that is done, it will follow that the plaintiff shall be awarded the possession of the property. The first is a

means simply of obtaining the second. The one is the cause of action; the other is the fruit of the action. It is said that the two causes of action are:—First, to vacate the fraudulent deed, and second, an action of ejectment to obtain the possession of the premises. Not so. The plaintiff has no legal title to the premises, and admits that he cannot sustain an action of ejectment for that reason. His cause of action is simply to vacate the deed. If that is done, he insists, as a result, that the court will at once award him the possession of the property. It would be unreasonable, he argues, to compel him to resort to another action to obtain that to which he is clearly entitled, and which the court may award in the action before it. I think the reasoning sound.[7] * * *

Judgment reversed.

KABRICH v. STATE INSURANCE CO.

Court of Appeals of Missouri, 1892. 48 Mo. App. 393.

GILL, J. On November 5, 1888, the defendant by its policy insured for the period of one year one W. G. Nicum against loss or damage by fire on his farm house, in Audrain county, "loss if any, payable to George Kabrich, mortgagee, as his interest may appear." On Aug. 18, 1889, the building was destroyed by fire. Subsequently, the mortgagee Kabrich brought this suit. In his petition, and all in one count, in addition to the common allegations common to actions at law on the contract of insurance, it was further alleged that certain conditions printed in the body of the policy and relating to the occupancy, transfer of the property, etc., were wrongfully, fraudulently, or by mistake inserted, and the court was asked to strike out such conditions, and reform the instrument. The defendant moved and the court required the plaintiff to elect upon which of the two causes of action, thus set out in one count, he would proceed to trial. The plaintiff elected to try the action at law on the policy, and thereupon the court struck out the matter relating to the reformation of the contract.

[7] In the omitted part of the opinion it was held that even on the assumption that the complaint stated two causes of action the code permitted them to be joined.

Among other matters of defense, the answer set out that by the terms of the policy if the title of the property was, after the issuing thereof, transferred or changed without the written consent of the company indorsed on the policy, then said policy should be void. The evidence showed unquestionably that about two months after the policy was issued the assured Nicum did sell and convey the property to one Kelley, and to this the defendant company had not consented, nor, indeed, had any notice. At the close of the evidence the court instructed the jury as follows: "The court instructs the jury that the deed read in evidence, from W. G. Nicum to Julia Kelley, conveyed the property insured after the issue of the policy, and before the fire, and that fact, under the terms of the policy, rendered it void, as the company failed to consent thereto in writing, and the jury will, therefore, render a verdict for defendant."

From a verdict and judgment for defendant the plaintiff appealed.

The court correctly required plaintiff to elect upon which of the two causes of action, stated in one count of the petition, he would proceed to trial. Clearly plaintiff had intermingled in the one count two causes of action; one to reform the policy, which was equitable, and triable alone before the court, and the other an action at law on the policy, which was triable by a jury. While the code permits the joining of legal and equitable suits, yet they must be separately stated and relief separately prayed, so that each may be separately tried, the one by the court, and the other, if desired, by the jury. Henderson v. Dickey, 50 Mo. 161. He might with propriety have amended his petition and separated the two causes into two distinct counts, and then tried each separately. But he failed to amend, and chose to submit his case on the one count,—the legal action on the policy; thereby in effect abandoning the cause in equity. Electing to prosecute one of the two causes of action (which have been erroneously combined in one count) is necessarily the abandonment of the other. The plaintiff then having relinquished the suit to reform the policy, he was not entitled to introduce evidence only pertinent thereto; and, hence, the court did not err in excluding such proffered evidence. And this answers counsel's point number 2. * * *

Judgment affirmed.

WHETSTONE v. BELOIT STRAW BOARD CO.

Supreme Court of Wisconsin, 1890. 76 Wis. 613.

ORTON, J. The plaintiff alleged in his complaint that he was employed in and about the shop or building in which the defendant manufactured straw building board by the use of dangerous steam machinery, and by the use of steam rotaries made of boiler iron, which were in an unsafe and dangerous condition, to the knowledge of the defendant, or which it might have known by reasonable care, and which was unknown to the plaintiff, and that, by reason of their unsafe and dangerous condition, one of them burst or exploded, and scattered the fragments thereof about said building, some of which struck the plaintiff, and injured him very greatly, and caused him to be in such a condition of mind that he did not know what he was doing, and could not, and did not, realize his situation, or appreciate the effect of, or carry on, any business transaction. And the plaintiff, alleged further, that while he was in such condition of body and mind, the defendant, through its officers and agents procured and induced him to sign a certain receipt, set out in the complaint, by which he released the defendant forever from all liability by reason of any and all injuries sustained by him as aforesaid, or any result therefrom, and from all actions, or causes of action, against the defendant by reason thereof; that, at the time of signing said instrument, he (the plaintiff) was not in a condition to realize what he was doing, or the effect thereof; and that the defendant took advantage of his condition, and procured the said instrument by fraud. The plaintiff prayed judgment for $20,000 damages, and that said receipt or release be declared void and delivered up. This is, substantially, the complaint. The defendant demurred to the complaint, (1) that in it several causes of action were improperly united; and (2) that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled. The first ground was the only one pressed on the argument. The learned counsel of the appellant contended that the matter of the release constituted a separate and distinct cause of action that could not be joined with the main action.

It is quite obvious that the complaint states only one cause of action. The matter of the release is simply ancillary to the ac-

tion. It is merely to set aside the release, which stood in the way of recovery in the action. It is subservient or subsidiary to the action, and is necessary to a recovery. The plaintiff might have waited for the defendant to set up the release in defense, and then have attacked it by a replication;[8] but he chose to set it up in his complaint and avoid it, which is strictly correct pleading. Lusted v. Railway Co., 71 Wis. 391, 36 N. W. Rep. 837. In that case the receipt was set up in the answer, and the issue thereon was first tried. In Damon v. Damon, 28 Wis. 510, the plaintiff first set up her causes for a divorce, and secondly asked for alimony, and thirdly prayed that a certain deed made by the defendant to a third person in fraud of her rights be set aside, and such third person was made a party. The defendant demurred for misjoinder of causes of action, as here. This court held that there was but one cause of action, and that the matter of setting aside the deed was to enable the court to enforce its judgment of alimony, if it adjudges a transfer of property to the plaintiff, and that it is only ancillary or incident to the action. That is a stronger case of two separate causes of action than here. In Moon v. McKnight, 54 Wis. 551, 11 N. W. Rep. 800, the action was against A and B, who are husband and wife, and H, who held a mortgage of land from B, to have a prior deed from A and B to plaintiff, absolute on its face, declared a mortgage; to have a subsequent recorded deed, purporting to have been executed by the plaintiff to B, conveying to her the same land, set aside as a forgery; and to have the plaintiff's mortgage foreclosed against all the defendants. This complaint was also demurred to for improper joinder of separate causes of action. This court held that there was virtually but one cause of action. These apparently separate causes of action, and the relief therein, "were essential and a prerequisite to the plaintiff's foreclosure." They were obstructions to the main relief, and had to be removed to make the plaintiff's judgment of foreclosure effectual. Many other like cases might be cited, if it was not too plain a question for argument or authority. The order of the circuit court is affirmed, and the case remanded for further proceedings according to law.

[8] But see Hancock v. Blackwell, 139 Mo. 440, to the effect that in such cases the release must be set aside in equity before an action at law can be maintained. And so in McIsaac v. McMurray, 77 N. H. 466 (1915), post.

IMPERIAL SHALE BRICK CO. v. JEWETT.

Court of Appeals of New York, 1901. 169 N. Y. 143.

Appeal from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered July 28, 1899, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

LANDON, J. The plaintiff brought this action to reform a contract of insurance, and, as reformed, to recover against the 19 defendants as joint insurers of a cargo of pressed bricks shipped by plaintiff at Cleveland, Ohio, about October 2, 1895, to Waukegan, Ill. The cargo became a total loss, and did not reach its destination. * * *

The defendants complain that, against their objection and exception, the action was tried at the equity term, instead of before a jury. The plaintiff applied for insurance upon its cargo in transit by lake from Cleveland, Ohio, to Waukegan, Ill. By mistake, Waukegan, Mich., was written in the certificate, and not observed by the plaintiff until after the loss. There is no such port as Waukegan, Mich. The plaintiff properly asked in its complaint to have the certificate corrected in this respect. If the defendants had admitted by their answer the statement of facts alleged in this behalf in the complaint, as they did upon the trial, the equitable[9] issue would not have arisen; but they did not, but interposed a denial, and thus the case properly came on for trial at the equity term. The complaint does not contain separate equitable and legal causes of action, but it asks such relief in equity as would, if granted, permit a recovery as at com-

[9] Peckham, J., in Linton v. Fire Works Co., 128 N. Y. 672, (1891): * * * "We do not, however, think that relief could be had by reference only to the original oral contract, and in spite of the terms of the subsequent written one, without reforming such written one so as to comform to the truth. A written contract is always set out as the exponent of the oral understanding of the parties. While it exists as a full and legal agreement, it must control as to all the terms expressed in it, and, when such terms differ from those of prior oral ones, the writing must control. It is necessary, therefore, to reform it so as to express the true agreement."

mon law. But the complaint stated no common law cause of action, except as conditioned upon the equitable relief, and hence the right to recovery rested primarily upon equitable grounds. The court, having obtained jurisdiction in equity may, if it grant the equitable relief, retain jurisdiction, and render that further judgment which properly follows thereupon.[10] Wheelock v. Lee, 74 N. Y. 496, cited by defendants, was precisely the reverse. In that case, there were four causes of action at law for the recovery of money. Conditioned upon such recovery was the demand that certain securities be surrendered. Of course, in such a case, success in the actions at law is a condition precedent to any equitable relief, and the joinder of the former with the latter ought not to deprive the defendant of a jury trial of the former.

We have examined the other errors assigned by the defendants, but do not think any of them justify the reversal of the

10 Nelson, J., in Tayloe v. Insurance Co. 9 How. 390, (U. S. Sup. 1850):

"The party, therefore, had a right to resort to a court of equity to compel the delivery of the policy, either before or after the happening of the loss; and being properly in that court after the loss happened, it is according to the established course of proceeding, in order to avoid delay and expense to the parties, to proceed and give such final relief as the circumstances of the case demand.

Such relief was given in the case of Motteux v. London Assurance Company (1 Atk., 545), and in Perkins v. Washington Insurance Company (4 Cow., 645). (See, also, 1 Duer., 66 and 110, and 2 Phillips, 583.)

As the only real question in the case is the one which a court of equity must necessarily have to decide, in the exercise of its peculiar jurisdiction in enforcing a specific execution of the agreement, it would be an idle technicality for that court to turn the party over to his remedy at law upon the policy. And, no doubt, it was a strong sense of this injustice that led the court at an early day to establish the rule, that, having properly acquired jurisdiction over the subject for a necessary purpose, it was the duty of the court to proceed and do final and complete justice between the parties, where it could as well be done in that court as in proceedings at law." * * *

And so in Bidwell v. Astor Ins. Co., 16 N. Y. 263, (1857). * * * "There was nothing in the objection that the court should have stopped with reforming the policy, and turned the plaintiffs over to a new action to recover their damages. The rule of courts of equity was, when they had acquired jurisdiction, and had the whole merits before them, to proceed and do complete justice between the parties. (Perkins v. Washington Ins. Co., 4 Cow., 645)" * * *.

judgment of the trial term except as to the defendant Hickman.

The order of the Appellate Division should be reversed, with costs, and judgment of the trial court affirmed, except as to the defendant Hickman, and, as to him, order affirmed, and judgment absolute ordered in his favor on the stipulation, with costs.[11]

SOUTH BEND CHILLED PLOW CO. v. GEORGE C. CRIBB CO.

Supreme Court of Wisconsin, 1900. 105 Wis. 443.

Appeals from the Circuit Court for Milwaukee county, from orders overruling separate demurrers to the complaint, each grounded on the proposition that such complaint states several causes of action that cannot be properly joined. The complaint, by appropriate allegations, sets forth that each of the plaintiffs is a creditor of the defendant corporation, the George C. Cribb Company; the amount of the indebtedness as to each; that the action is brought in behalf of the plaintiffs as creditors of such corporation and of all persons similarly situated; that, after the indebtedness mentioned accrued, the officers and directors of the corporation, named as defendants, in breach of their duties as such to the corporation, wasted and misapplied its assets and converted the same to their own use and to the use of the defendant corporation, the Cribb Carriage Company, which last-named corporation is alleged to have been formed by such officers and directors in aid of a scheme formed by them to remove the assets of the George C. Cribb Company, without consideration, from its control and beyond the reach of its creditors, which scheme was carried out, leaving the debtor corporation wholly insolvent. All the various steps resorted to, to effect the scheme above stated, are set forth in the complaint, together making a good cause of action in equity at the suit of creditors, against the officers of the George C. Cribb Company and the corporation and persons who fraudulently obtained the property of such

11 That a complaint seeking to reform a mortgage and foreclose it, states a single cause of action, see Hutchinson v. Ainsworth, 73 Cal. 452, (1887).

company as alleged, or some part thereof, to set aside the alleged fraudulent transfers and compel an accounting by such officers of their official management of the affairs of the corporation so far as necessary to protect the plaintiffs as creditors and protect all other persons similarly interested. The complaint contains a prayer for relief to that effect, and, in addition, for judgment against the George C. Cribb Company in favor of the South Bend Chilled-Plow Company for the amount claimed to be due it, and similar judgments in favor of the St. Paul Plow Company and the Western Wheeled-Scraper Company respectively.

MARSHALL, J. The complaint, in all essential parts, is the same as that considered on the first appeal in this case, reported in 97 Wis. 230, 72 N. W. 749. While the question here raised was not presented for consideration there, it was necessarily involved and was decided in reaching the conclusion upon which the decision was grounded; and the result is therefore *res adjudicata* of the same question, presented, as it now is, as the primary subject for adjudication. * * *

Notwithstanding the foregoing, some observations on the merits of the question presented will not be out of place, and may be helpful in other cases.

As has often been said by this court, the test of whether there is more than one cause of action stated in a complaint is not whether there are different kinds of relief prayed for or objects sought, but whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication. Gager v. Marsden, 101 Wis. 598, 77 N. W. 922. In every cause of action there must exist a primary right, a corresponding primary duty, and a failure to perform that duty. The result may be, and often is, that the wronged party is entitled to several kinds of relief. The fact that, in such circumstances, in his action to enforce the right denied, the plaintiff prays for full relief, combining several elements or objects, does not render the complaint open to demurrer on the ground of multifariousness. In testing a complaint to determine whether it is single or double as regards primary rights, the different objects in view by the pleader, as indicated by the prayer for relief, are not controlling. They are of no significance whatever, except to aid in construing the allegations of the pleader and in clearing up obscurities that may exist, as to whether he

intended to state facts showing a violation of distinct primary rights, or not. When there is no obscurity in that regard, the statement of facts upon which the prayer for relief is based alone speaks, and if the language shows presentation for adjudication of a single controversy, it cannot be enlarged by what follows in the prayer for relief even though it be appropriate to several distinct causes of action.

Applying what has been said to the pleading in this case, but one cause of action can be discovered which the pleader is seeking to enforce, and that is to compel the officers of the George C. Cribb Company to account, for their official conduct in the management and disposition of the funds and property of the corporation, for the benefit of its creditors. That involves, necessarily, an adjudication as to the amount of the claims of the respective creditors, whether plaintiffs or defendants, and the rights of parties who are the guilty participants with the officers of the corporation in fraudulently disposing of or wasting its property. The facts pleaded show a single cause of action, as indicated, with such clearness that the scope of the prayer for relief cannot, by any rule of construction, change it to a statement of two primary rights violated and the presentation of two primary controversies for adjudication. The result is that the orders appealed from must be affirmed.

SECTION 2. ONE FORM OF ACTION.

CODE OF CIVIL PROCEDURE OF NEW YORK.

§ 3339.[1] There is only one form of civil action. The distinc-

[1] In a number of the codes, the corresponding provision omits the clause abolishing the distinction between actions at law and suits in equity. For the exact wording, see: Alaska, Code Civ. Proc. 1900, § 1; Arizona, R. S. 1913, § 425; Arkansas, Dig. Stat., 1919, § 1030 (by § 1033 it is provided that proceedings in a civil action may be, 1, at law, and 2, in equity); California, Code Civ. Proc., 1915, § 307; Colorado, R. S., 1908, § 1; Connecticut, Gen. Stat., 1918, § 5630; Idaho, Comp. Stat., 1919, § 6591; Indiana, Burns Ann. Stat., 1914, § 249; Iowa, Comp. Code, 1919 § 7059 (It is also provided that proceedings are of two kinds, ordinary and equitable); Kansas, Gen. Stat., 1915, § 6900; Kentucky, Rev Code, 1900, § 4, (by § 5 ac-

tion[2] between actions at law and suits in equity, and the forms of those actions and suits, have been abolished.

tions are ordinary or equitable); Minnesota, Gen. Stat., 1913, § 7673; Missouri, R. S., 1919, § 1153; Montana, Rev. Code, 1907, § 6425; Nebraska, Ann. Stat., 1911, § 1001; Nevada, Rev. Laws, 1912, § 4943; New Mexico, Ann. Stat., 1915, § 4067; New York, Civ. Practice Act, 1920, Art. 1, § 8; North Carolina, Consol. Stat., 1919, § 399; North Dakota, Comp. Laws, 1913, § 7355; Ohio, Gen. Code, 1921 § 11238; Oklahoma, Rev. Laws, 1910, § 4650; Oregon, Code Civ. Proc., 1920, § 1, (one form of action at law; by § 389 suits in equity are retained); South Carolina, Code Civ. Proc., 1912, § 114; South Dakota, Rev. Code, 1919, § 2260; Utah, Comp. Laws, 1917, § 6442; Washington, Rem. & Bal. Code, 1910, § 153; Wisconsin, Stat., 1919, § 2600; Wyoming, Comp. Stat., 1920, § 5555; United States, Equity Rules, 1912, Rule 18, (abolishing technical forms of pleadings in equity).

2 Selden, J., in Reubens v. Joel, 13 N. Y. 488 (1856): * * * What are the distinctions between actions at law and suits in equity? The most marked distinction obviously consists in their different modes of relief. In the one, with a few isolated exceptions, relief is invariably administered, and can only be administered, in the form of a pecuniary compensation in damages for the injury received; in the other, the court has a discretionary power to adapt the relief to the circumstances of the case. By what process can these two modes of relief be made identical? It is possible to abolish one or the other, or both, but it certainly is not possible to abolish the distinction between them. The legislature may, unless prohibited by the constitution, enact that no court shall hereafter have power to grant any relief, except in the form of damages, and thereby abolish all suits in equity; or that all courts shall have power to mould the relief to suit the particular case, and thereby virtually abolish actions at law as a distinct class. To illustrate by a single case: they may provide that where a vendor of land, who has contracted to sell and received the purchase money, refuses to convey, the vendee shall have no remedy but an action for damages, or, on the other hand, that he shall be confined to a suit for a specific performance; but it is clearly beyond the reach of their powers to make these two remedies the same. Another leading distinction between common law actions and suits in equity consist in their different modes of trial. The former are to be tried by a jury, the latter by the court. Can the legislature abolish this distinction? They might, but for the restraints of the constitution, abolish either kind of trial, or re-classify the classes to which they apply; but they cannot make trial by jury and trial by the court the same thing. It is plain that the only way in which the declaration contained in § 69, that "there shall be in this state hereafter but one form of action for the enforcement or protection of private rights, and the redress of private wrongs," can be made good, is by abolishing both the form of trial

FARRON v. SHERWOOD.

Court of Appeals of New York, 1858. 17 N. Y. 227.

Appeal from the superior court of Buffalo. The complaint was: "First. That the defendant is indebted to the plaintiff in the sum of fourteen hundred and twenty-nine and 54/100 dollars, for work, labor and services done and performed for the defendant, at his special instance and request, at the city of Buffalo, by the plaintiff and his servants and agents, at divers times between the 8th day of May, 1852, and the commencement of this action, in and about quarrying, dressing, preparing, delivering, putting together and erecting certain building stones, in and about defendant's dwelling on Main street, in said city of Buffalo, and that said work, labor and services were reasonably worth the sum of fourteen hundred and seventy-nine and 54/100 dollars; and that the defendant has not paid the plaintiff the said sum nor any part thereof, but has hitherto wholly neglected and refused so to do. Second. And, for a second cause of action against the defendant, the plaintiff says that the defendant is indebted to him in the sum of thirty-eight and 4/100 dollars, for certain dressed building stones, before the commencement of this action sold and delivered by the plaintiff to the defendant, at the city of Buffalo, at defendant's special instance and request; that the said building

and the mode of relief in one or the other of the two classes of actions. When this is done, and not till then, shall we have one homogenous form of action for all cases. Has the legislature power to do this?"

The code makes the following provision for trial by jury and for trial by the court:

"In each of the following actions, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is directed:

1. An action in which the complaint demands judgment for a sum of money only.

2. An action of ejectment; for dower; for waste; for a nuisance; or to recover a chattel." N. Y. Code Civ. Proc. § 968.

"An issue of law, in any action, and an issue of fact, in an action not specified in the last section, or wherein provision for a trial by a jury is not expressly made by law, must be tried by the court, unless a reference or a jury trial is directed." N. Y. Code Civ. Proc. § 969.

Where an action is strictly equitable, there is no right of trial by jury, though the only relief demanded is the recovery of a sum of money, Bell v. Merrifield, 109 N. Y. 202, (1888).

stones were reasonably worth the sum of thirty-eight and 4/100 dollars; and that the defendant has not paid the plaintiff the said sum, or any part thereof; but has hitherto wholly neglected and refused so to do. Wherefore the plaintiff demands judgment against the defendant for the sum of fifteen hundred and seventeen dollars and sixty-three cents, besides the costs of this action." The defendant, by his answer, denied each and every allegation of the complaint. The action was tried before a referee. Upon the trial, the plaintiff produced several witnesses, who proved the work, labor, and materials specified in a bill of particulars, furnished the defendant, of the plaintiff's claim, and the value of the different items; and then rested. Whereupon the defendant proved payment of $1,002, and then proved and read in evidence a special contract between him and the plaintiff, under which the labor, except sixty-four days' labor, worth $2 per day, and altering a buttress, worth $6 was done. Upon the proof and the pleadings the case was submitted to the referee, "the defendant then and there insisting that the plaintiff could not recover, but for the extra work, except upon the special contract, which he had neither stated in the complaint nor proved;" but the referee overruled the objection; to which the defendant excepted. The referee reported in favor of the plaintiff for $299.55. Judgment having been entered on the report, the defendant appealed to the general term of the superior court, by which the judgment was affirmed; and the defendant thereupon appealed to this court.

STRONG, J. The first point made by the counsel for the appellant is, that for the portion of the work and labor done under the special contract, the remedy of the plaintiff was upon that contract; and that he was not entitled to recover upon the common counts. It is necessarily assumed in support of this position that the contract is the cause of action for that work and labor; and if that be so, the position is correct; that cause of action not being stated in the complaint,[3] and the objection being

[3] The complaint must contain:

"1. The title of the action, specifying the name of the court in which it is brought; if it is brought in the supreme court, the name of the county, which the plaintiff designates as the place of trial; and the names of all the parties to the action, plaintiff and defendant.

"2. A plain and concise statement of the facts, constituting each cause of action, without unnecessary repetition.

taken at the trial, the referee erred in allowing the part of the plaintiff's claim in question. But the assumption is wholly unwarranted in the case. It was not objected at the trial that the contract had not been fully performed on the part of the plaintiff; no question was raised, and, so far as appears, there was no ground for any question on that subject. Hence it must be deemed that the plaintiff had done all that was incumbent on him to do, and that nothing remained to be done by the contract but the payment of the stipulated price by the defendant. The case is therefore within the settled rule that where there is a special agreement and the plaintiff has performed on his part, the law raises a duty on the part of the defendant to pay the price agreed upon, and the plaintiff may count either on this implied *assumpsit* or on the express agreement. A new cause of action upon such performance arises from this legal duty, in like manner as if the act done had been done upon a general request without an express agreement. (Lawes' Pl. 5; Jewel v. Schroeppel, 4 Cow. 564; Feeter v. Heath, 11 Wend 484; Mead v. Degolyer, 16 id. 637, 638; Clark v. Fairchild, 22 id. 576.) This rule is not affected by the code; the plaintiff might, as he has done, rest his action on the legal duty; and his complaint is adapted to and contains every necessary element of that cause of action. It was not necessary to state in terms a promise to pay; it was sufficient to state facts showing the duty from which the law implies a promise; that complies with the requirement that facts must be stated constituting the cause of action. (Allen v. Patterson, 3 Seld. 476.)

The defendant was not precluded by the form of the complaint from setting up and availing himself of any defense he had under the contract.

All the judges concurring.

Judgment affirmed.

"3. A demand of the judgment to which the plaintiff supposes himself entitled."—N. Y. Code Civ. Proc. § 481.

EYERMAN v. MT. SINAI CEMETERY ASSOCIATION.

Supreme Court of Missouri, 1876. 61 Mo. 489.

WAGNER, J. The petition states that the defendant was indebted to the plaintiff in the sum of two thousand five hundred and ninety dollars and ninety-three cents, for work and labor done and materials furnished, which were then set out at the prices agreed upon in the writings afterwards referred to. It was then alleged that the work and labor were done, and the materials were furnished under the terms and conditions of a certain instrument of writing, executed by the plaintiff and defendant, and which was produced and shown to the court; that plaintiff kept and performed all the terms and conditions of the instrument of writing to be kept and performed by him; that he furnished the materials in the writing specified of a proper and suitable character and did the work therein specified in a good and workmanlike manner, all of which was done under the supervision of the engineer of the plaintiff(?), and accepted by him, etc. The answer was a denial of all the allegations in the petition.

At the instance of the plaintiff the court in effect declared the law to be, that altogether some of the material was not what the contract required, yet the plaintiff should be allowed what it was reasonably worth. And there was a refusal to instruct for the defendant, that unless the plaintiff had performed his part of the contract, in manner, form and quality as specified in the agreement, he could not recover.

There was a judgment at special term for plaintiff, which was reversed at general term, and the cause was appealed to this court.

In Yeats v. Ballantine (56 Mo. 530) all the cases in this court bearing on the question here involved, were cited and commented on. The established rule extracted and deduced from all the cases is, that where a party fails to perform his work according to the stipulations of his agreement, he cannot recover on the special contract; but if the services rendered by him or the materials furnished are valuable to the other party, and are accepted by such party, then he would be liable to pay the actual value of the work performed, or the materials furnished, not exceeding the contract price, after deducting for any dam-

ages which had resulted from a breach of the agreement. There may be a recovery upon a *quantum meruit*, although the contract has not been complied with, but in such a case the petition must be grounded on a reasonable value, and it must not be declared on the contract. If the action is brought upon the agreement, a performance of its terms must be shown before a recovery can be sustained. The correctness of the ruling of the court at general term depends upon the character of the petition. Now the petition says that the work and labor were done, and the materials were furnished under the terms and conditions of a contract, which is shown to the court, and it is averred that the plaintiff kept and performed all the terms and conditions of the contract which were to be kept and performed by him, and judgment is asked for the work done and materials furnished at the contract price. This evidently amounts to a petition on the contract, and it devolved on the plaintiff, as a prerequisite to a judgment in his favor, to show a performance on his part of its stipulations.

The general term, therefore, did not err in its judgment, and if the plaintiff cannot show a compliance on his part, he should amend his petition, in order that he may proceed on a *quantum meruit*.

The judgment must be affirmed. The other judges concur, except Judge Vories, who is absent.

MILLER v. HALLOCK.

Supreme Court of Colorado, 1886. 9 Col. 551.

This was an action instituted by the plaintiff in error to recover the alleged contract price of a quantity of wood delivered by said plaintiff to the defendant in error. The complaint states that the wood was delivered on a contract entered into between the parties. It alleges that "during the months of September and October, 1882, the said plaintiff sold and delivered to the said defendant one hundred and ninety-five and three-fourths cords of wood, in consideration for which the said defendant then agreed and promised to pay plaintiff the sum of $496.23, which said defendant has wholly failed and neglected to do, and

said sum of $496.23 remains due and unpaid, for which plaintiff prays judgment and for costs of suit." The defendant's answer contains a specific denial of each allegation in the complaint. The only witness sworn was the plaintiff, who testified in his own behalf, against the objections of the defendant, that a man by name of Sargent came to his residence in Jefferson County, representing himself to be defendant's agent, and purchased for defendant two hundred and fifty cords of wood, agreeing to pay $2.50 per cord for — cords, and $2.65 per cord for the balance. Sargent directed the wood to be shipped to the defendant, and agreed that defendant should pay the freight. Plaintiff, believing the stranger to be the agent of Mr. Hallock, undertook the fulfillment of the contract and shipped wood to Mr. Hallock by railway for three weeks, and then came to the city to see about the matter. When he met the defendant the latter told him that he had purchased the wood from Sargent and had overpaid him for the quantity received, and that plaintiff had better look to Sargent, as he did not propose to pay twice for it. Defendant had used part of the wood received, and the balance was in defendant's yard. Defendant's counsel objected to any testimony of the alleged contract until the agency of Sargent should be first shown. The trial was to the court, who stated that the testimony would be received, but disregarded unless the agency was shown. The plaintiff having no proof of the alleged agency, the court, at the conclusion of the testimony, sustained the defendant's motion for a nonsuit.

BECK, C. J. It is conceded by the parties to this cause that the man Sargent, who procured the shipment of the wood from the plaintiff, Miller, to the defendant, Hallock, was a swindler, and that both plaintiff and defendant acted in food faith. Plaintiff's counsel contends that the plaintiff is entitled to compensation from Hallock for his wood, because it was neither sold nor delivered to Sargent, but shipped to, received by, and converted to the use of the said defendant. In support of this theory, counsel cite the following cases, which are clearly analogous to this case, so far as the facts are concerned, and which seem to sustain the rule of liability contended for. Hamet v. Letcher, 37 Ohio St. 356; Barker v. Dinsmore, 72 Pa. St. 427; Klein v. Seibold, 89 Ill. 540; Barnard v. Campbell, 55 N. Y. 457; Moody v. Blake, 117 Mass. 23.

The theory of the defense, however, is unanswerable so far as

the present action is concerned. It is that the complaint counts upon a contract for the sale of the wood, alleged to have been entered in between the plaintiff and the defendant, whereas the proof wholly failed to sustain the allegation. The cause and character of the cases above cited were wholly different from the action instituted in this case. The former were actions to recover back the specific property which had been fraudulently obtained from the owners, or, where the property itself could not be recovered, to recover the value thereof from the persons who had converted it to their own uses. Here the action brought is upon an alleged contract entered into by the parties specifying the quantity of wood to be delivered by the plaintiff, and the price to be paid therefor by the defendant. No such contract having been made, of course it could not be proved, and the court was compelled to grant a non-suit. There was a fatal variance between the allegations of the complaint and the proofs. In such a case it is not enough that the evidence of the plaintiff show a case that calls for some relief. To entitle him to judgment he must show himself entitled to the relief called for by the facts stated in his complaint. As stated by the supreme court of California, in Mondran v. Goux, 51 Cal. 151: "The rule is well settled that the plaintiff must recover, if at all, upon the cause of action set out in his complaint and not upon some other which may be developed by the proofs."

A cause of action is a wrong committed or threatened. It may consist of the wrongful conversion of property, or of the non-performance of an agreement. In one case the cause of action would sound in tort, the other in contract; and, while the relief sought might relate to the same subject-matter, yet proof of facts sufficient to sustain the action for the tort, would be insufficient to sustain the action for the non-performance of the agreement, for the reason that the *probata* would not correspond with the *allegata*. The complaint would state one cause of action, every material averment of which might be controverted and put in issue by the answer of the defendant, while the facts proved would be foreign to the issues joined. That is just the case here presented. The complaint states a cause of action arising *ex contractu*, and each material averment thereof has been controverted and put in issue by the answer of the defendant, in the exercise of his legal rights. The proofs introduced and offered in evidence tended to establish a cause of action

arising *ex delicto*. "A party can have no relief beyond what the averments of his pleadings entitle him to." The allegations of the complaint, the evidence, and the finding should correspond in legal intent. Tucker v. Parks, 7 Colo. 62, (1 Pac. 427); Gregory v. Haworth, 25 Cal. 656.

Judgment affirmed.

WALKER v. DUNCAN.

Supreme Court of Wisconsin, 1887. 68 Wis. 624.

The plaintiff in his complaint alleged, in effect, that the defendant was justly indebted to him in the sum of $3,375 for 250,000 feet of saw-logs theretofore sold and delivered to the defendant by the plaintiff, and at his special instance and request. The answer was a general denial. At the close of the trial the jury returned a verdict in favor of the plaintiff for $600 damages. From the judgment thereon the defendant appeals.

CASSODAY, J. The defendant owned a saw-mill on Silver Creek, with a mill-pond which he used for storing saw-logs. Three-fourths of a mile above was another saw-mill, owned by one Palmer, with a mill-pond similarly used. In the winter of 1880-81, the plaintiff got into Palmer's mill-pond and there stored a large quantity of saw-logs belonging to himself. The evidence on the part of the plaintiff tended to prove that in a time of high-water, in September, 1881, a portion of the plaintiff's saw-logs floated out of Palmer's pond into the defendant's pond, and were sawed by the defendant and converted to his own use without the consent of the plaintiff. The principal error assigned is that the cause of action thus proved was not the one alleged in the complaint, and that the variance was fatal. The cause of action alleged in the complaint is upon contract. The cause of action proved is in tort. But this court has repeatedly held that, when money or property has been tortiously converted, the owner may waive the tort, and sue and recover upon contract. Grannis v. Hooker, 29 Wis. 65; Norden v. Jones, 33 Wis. 600; Western Assurance Co. v. Towle, 65 Wis. 254.

That is what was done here, and we must therefore regard the variance as immaterial.[4] * * *

Judgment affirmed.

GOULET v. ASSELER.

Court of Appeals of New York, 1860. 22 N. Y. 225.

Appeal from the superior court of the city of New York. Action for taking, selling and converting to the defendant's use a quantity of wines, liquors, cigars and bar furniture, the stock and utensils of a restaurant. The plaintiff made title under a chattel mortgage executed to him by M. Caussidiere and E. Bonnier; and defendants justified under a judgment and execution against the mortgagors, in which judgment they were the plaintiffs, the execution being levied on the property by their direction. The mortgage was dated March 19, 1855, and purported to be for the security of $1,200, payable in one year from that date. It contained the following clause: "And until default be made in the payment of the said sum of money, we (the mortgagors), are to remain and continue in the quiet and peaceable possession of said goods and chattels, and in the full and free enjoyment of the same." The principal part of the property, in value, was wines, liquors and cigars. The defendants were prosecuting their actions when the mortgage was executed, and obtained judgment shortly afterwards. The officer sold the goods on the execution on the 27th April, 1855. The sale was in different parcels and the goods were delivered by the officer to the respective purchasers, and the proceeds were paid to the defendants. No mention was made of the mortgage at the sale, though the defendants had been informed of it after the levy and before the sale took place. It did not appear that the defendants purchased any of the goods at the sale. The action was commenced after the debt mentioned in the mortgage became payable; and the plaintiff had, after that time and before the bringing of this suit, demanded the goods of the de-

[4] Accord: Galvin v. Mining Co., 14 Mont. 508 (1894); Toledo, etc. Ry. Co. v. Chew, 67 Ill. 378 (under common law system of pleading).

fendants. The character of the complaint and of the evidence sufficiently appears from the following opinion.

The defendants, on the trial, insisted that the goods were subject to levy on execution against the mortgagors, and that the action could not be sustained. The jury were instructed to assess the value of the goods and to give their verdict for the plaintiff for that value, subject to the opinion of the court, with power to dismiss the complaint. The value was fixed by the jury at $850, and the court at general term gave judgment for the plaintiff for that amount. The defendants appealed. The case was submitted without oral arguments, on printed briefs.

SELDEN, J. If the plaintiff has any legal remedy for the injury of which he complains, it is clear that the remedy has not been properly pursued in the present case, and that the judgment therein cannot be sustained consistently with the well established principles of the common law, and the repeated decisions of this court. The difficulty in the case, and the error of the court below, will be most readily seen and appreciated by reference to some of the distinctions between those forms of action which the code has abolished. It can hardly be claimed that, prior to the code, an action of trespass or trover could have been maintained, either against the officer or the plaintiff in the execution, under the circumstances here disclosed. The case would have fallen directly within the principles of the case of Gordon v. Harper (7 Term. R. 9), and the subsequent cases of that class which have never been departed from, either in England or in this country. If any action would have lain before the code, it could only have been an action founded upon the special circumstances of the case, setting forth the injury to the contingent interest of the plaintiff in the property, and claiming damages for such injury.

While, however, in such an action, the plaintiff would have avoided the effect of the technical rule that, in order to recover in trespass or trover, he must show that he had either the actual possession or the right of the possession at the time of the alleged taking or conversion, he also, supposing that the action could have been maintained, would have imposed upon himself the necessity of proving, specifically, the damages which he had sustained. In trespass and trover, before the code, the plaintiff recovered, if at all, upon the ground that he was the owner of the property in controversy. The measure of damages, there-

fore, in all such cases, was the value of the property taken or converted. Although it appeared that the plaintiff held the title as mere security for a debt, and that his debtor was abundantly able to pay, so that his actual loss was nothing, his recovery, in cases where he recovered at all, was nevertheless for the full value of the property, provided that did not exceed the amount of his lien. In a special action on the case, on the contrary, the plaintiff could, under no circumstances, recover more than the damages shown to have been actually sustained. He must prove to what extent his security was impaired, by showing whether the debtor was or was not responsible, and whether or not it was still in his power to follow and enforce his lien against the property.

Although the code has abolished all distinctions between the mere forms of action, and every action is now in form a special action on the case, yet actions vary in their nature, and there are intrinsic differences between them which no law can abolish. It is impossible to make an action for a direct aggression upon the plaintiff's rights by taking and disposing of his property, the same thing, in substance or in principle, as an action to recover for the consequential injury resulting from an improper interference with the property of another, in which he has a contingent or prospective interest. The mere formal differences between such actions are abolished. The substantial differences remain as before. The same proof, therefore, is required in each of these two kinds of actions as before the code, and the same rule of damages applies. Hence, in an action in which the plaintiff establishes a right to recover, upon the ground that the defendant has wrongfully converted property to the possession of which the plaintiff was entitled at the time of the conversion, the proper measure of damages still is, the value of the property; while in an action in which the plaintiff recovers, if at all, upon the ground that the defendant has so conducted himself in the exercise of a legal right in respect to another's property, as unnecessarily and improperly to reduce the value of a lien, which the plaintiff could only enforce at some subsequent day, the damages must, of course, depend upon the extent to which that lien has been impaired.

If we apply these principles to the present case, the error in the judgment under review becomes apparent. The complaint is, in substance, the same as a declaration in trover, under the

former system of pleading. It is true that it sets out the mortgage as well as the judgment and execution obtained by the defendants, and the proceedings under them; but the gist of each of the counts is, that the defendants have taken the property of the plaintiff, and converted and disposed thereof to their own use. The form of the complaint in this respect would be of no importance, provided the proof had been such as to entitle the plaintiff to the judgment rendered. This court will not reverse a judgment simply because the case made by the evidence varies from that set forth in the complaint, where, as in this case, no objection was taken on that account at the trial. If it appears that the proof was sufficient to entitle the successful party to the judgment actually given, such judgment will be sustained. Here, however, the proof could, at most, only authorize the plaintiff to recover the consequential damages resulting to the contingent interest under the mortgage; while the damages were assessed and the judgment rendered upon the assumption that he was the owner of the property and entitled to the immediate possession. * * *

Judgment reversed.

ANDERSON v. CASE.

Supreme Court of Wisconsin, 1871. 28 Wis. 505.

LYON, J. The complaint charges that the defendants unlawfully seized and converted to their own use certain personal property therein described, in which the plaintiffs have an interest by virtue of a chattel mortgage thereon, executed by one J. D. Downer, to secure his indebtedness to them, to the amount of $155.75. The answer of the defendants admits the taking of the property, and denies all the other allegations of the complaint. * * *

The testimony tends to show that the defendants shipped and sold the hops with the consent and by the request of the plaintiffs.

Before the public sale of the balance of the property, the parties entered into a written agreement relative to the proceeds of the sale thereof, which the circuit court held operated as a

waiver of the alleged tortious taking of the property affected by it. This ruling of the circuit court, being in favor of the respondents, is not before us for review on this appeal.

The circuit judge instructed the jury, in substance, that if, after the defendants seized the hops, the plaintiff consented that they might ship and sell them, such a consent was a waiver of the wrongful taking, and the only remedy of the plaintiffs in such case would be an action for money had and received to recover the proceeds of the sale thereof. But this instruction was given with the following qualification: "The force and effect of such consent, if any was given, would depend very much upon the plaintiffs' understanding of the defendants' claim. If they understood that the defendants considered their claim to be subject and secondary to the plaintiffs' claim, and that the proceeds, by whomsoever collected, would be divided according to such respective rights, a consent under such circumstances ought not to be a waiver of the wrongful taking."

The plaintiffs had a verdict and judgment for the amount of their mortgaged property; and the defendants appeal from such judgment.

The action is for the unlawful conversion of the property described in the complaint. Before the adoption of the code, it would have been an action of trover. If the plaintiffs consented that the defendants should ship and sell the hops, then clearly there was no conversion, of the hops by the defendants, and no action of trover can be maintained therefor. The circuit judge so instructed the jury, and instructed them correctly. But the qualification to that instruction above stated we think is erroneous. We are unable to see how any misunderstanding between the parties as to their respective rights in the proceeds of the sale, or any misapprehension by the plaintiffs of the views of the defendants on the subject, not caused by the fraud of defendants, can effect such consent or weaken the force of it. If the plaintiffs gave such consent, and it was important to them to know, before doing so, what the views of the defendants were, as to which mortgage had priority, and as to which party was entitled to be first paid out of the proceeds of the sale, they should have ascertained before consenting to the sale, what those views were. And it cannot weaken or change the legal effect of such consent (the defendants being guilty of no fraud), if such consent was given without knowledge of the views of the

defendants in that behalf, or under a misapprehension of those views. In either case it must be held that the consent of the plaintiffs to the sale, if given, operated as a waiver of the alleged tort; and in such case there could not have been a wrongful conversion of the hops.

It is very evident that this objectionable instruction may have misled the jury. The jury may have found that the plaintiffs consented to the sale, and yet, under this instruction, if they also found that the plaintiffs gave such consent supposing that the defendants conceded the priority of their mortgage, the verdict must necessarily have been for the plaintiffs.

The plaintiffs contend, however, that although they have failed to establish their right to recover in this form of action for the conversion of the property, they have proved their right to recover the proceeds of the sale thereof in an action for money had and received, and that therefore the verdict and the judgment should not be disturbed.

The rule on this subject is, that where the case has been tried on the merits and substantial justice done between the parties, the verdict will not be set aside upon a question of form only, or upon some merely technical objection to the form of the action. 3 Graham and Waterman on New Trials, chap. XIV, sec. IX, and cases cited.

We think that an application of this rule to the present case will not save this verdict and judgment. The distinction between an action for the wrongful conversion of property, and an action for money had and received, is not merely technical or formal, but is a substantial one. The former is an action *ex delicto,* the latter *ex contractu.* In the one execution goes against the body, in the other, against the property only, of the defendant. The defendants in this action are liable to be imprisoned by virtue of an execution issued upon the judgment against them, while they would not be so liable were this an action for money had and received.

It is believed that no case can be found which attempts to ignore this vital distinction between those actions, or to deal with it as merely a formal or a technical matter. Certainly the learned counsel for the plaintiffs has not referred us to such a case.

We find no other error in the instructions which were given to

the jury by the circuit judge. But for the error aforesaid, we think that there should be a new trial.

Judgment reversed.

BARNES v. QUIGLEY.

Court of Appeals of New York, 1874. 59 N. Y. 265.

Appeal from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict, and affirming an order denying a motion for a new trial.

The complaint in this action, in substance, alleged that on the 3d day of April, 1871, plaintiff was the owner of a promissory note made by defendant, payable to the order of Britton & Co., for $2,165.86; which was indorsed by the payees and transferred to plaintiff before maturity; that prior to its maturity the payees failed and made an assignment; that on or about the day mentioned, defendant, for the purpose of deceiving plaintiff and inducing him to surrender up the note for a less sum than was due thereon, falsely and fraudulently represented that the note was made by him solely for the accommodation of the payees, he receiving no consideration whatever therefor, and that all moneys paid by him upon the note would be an entire loss, whereas the note was in fact for merchandise sold by the payees to defendant, and that he received full value for the note. That plaintiff relying upon said representations, and being ignorant of the facts, was induced thereby and did accept $582.70 less than the amount due, and surrendered up the note.

That by reason of the premises said plaintiff has been deceived and defrauded by said defendant out of said sum of $582.70, and has sustained damage to that amount.

Defendant's answer admitted the allegations of the complaint as to the making, indorsement and transfer of the note, the failure of the payees, and that he paid the sum of $1,600 in full settlement of the note, which was surrendered up to him. He denied all the other allegations of the complaint. On the trial plaintiff moved for judgment on the pleadings, which motion was granted, and directed a verdict for the balance unpaid on the note, to which defendant's counsel duly excepted.

ALLEN, J. The complaint is for fraud, and not upon contract. Whether the facts stated constitute a cause of action is not material. The whole frame-work is in fraud, and the cause of action, as set forth, is based upon the false and fraudulent representations of the defendant, by which the plaintiff was induced to surrender and give up to the defendant his promissory note, held and owned by the plaintiff, for an insufficient consideration, an amount considerably less than its face, by reason whereof, as alleged, the "plaintiff has been deceived and defrauded out of said sum of $582.70, and has sustained damage to that amount."

The theory of the plaintiff at the commencement of the action, and the foundation of his claim as formally made in his complaint, was, that a surrender of the note upon the receipt of an agreed sum, less than the amount actually due in satisfaction for the full sum, was equivalent to a release under seal, and effectually discharged the debt. In that view he could only recover by impeaching the release and discharge, for fraud, and he framed his complaint to meet the case in that form. His whole cause of action rested upon the alleged fraud, and it was an entire change of that cause, and a surprise upon the defendant, when this view was ignored by the counsel and the court at the trial, and a verdict ordered upon a denial in the answer of the only material allegations of the complaint. We are not to speculate upon the question whether the surrender of the note did discharge the obligation. The plaintiff assumed that it did, and brought his action to recover for the fraud by which the discharge was procured. It was error in the court to change the form of the action, by striking out or treating as surplusage the principal allegations—those which characterize and give form to the action—because, perchance, there may be facts stated by way of inducement spelled out, which would, when put in proper form, have sustained an action of *assumpsit*.

The defendant was called upon to answer the allegations of fraud,[5] and not to resist a claim to recover in *assumpsit*. The

[5] The same rule has been developed in equity, that a bill, clearly framed on the basis of fraud, would not be sustained on some other ground incidentally disclosed, Ferraby v. Hobson, 2 Phil. Ch. 255 (1847).

For comments on this class of cases, see "The Theory of a Pleading", by Prof. Whittier, 8 Columbia Law Review, 523.

two forms of actions might require very different defenses. This is not the case of an obligation or contract fraudulently incurred, in an action upon which the fraudulent acts of the obligor or promissor are averred, which, as they do not enter into the contract, and are not essential to the cause of action, may and should be rejected as surplusage, as in Graves v. Waite (59 N. Y. 156), recently decided by this court. The plaintiff was not, under the complaint, entitled to a verdict and judgment, as in an action upon the note. The defendant, in preparing his answer and putting in his defense, was as unconscious of any necessity of stating and setting up any defense he might have to the note, as the framer of the complaint was innocent of any intent to make a case for a recovery upon the note, as a valid and subsisting obligation. While the Code is liberal in disregarding technical defects and omissions in pleadings, and allowing amendments, it does not permit a cause of action to be changed, either because the plaintiff fails to prove the facts necessary to sustain it, or because he has mistaken his remedy, and the force and effect of the allegations of his complaint. (Code, § 173; DeGraw v. Elmore, 50 N. Y. 1; Ross v. Mather, 51 id. 108; Elwood v. Gardner, 45 id. 349.)

The judgment must be reversed and a new trial granted, costs to abide the event.

GREENTREE v. ROSENSTOCK.

Court of Appeals of New York, 1875. 61 N. Y. 583.

Appeal from the judgment of the General Term of the Superior Court of the City of New York, affirming a judgment in favor of plaintiff entered upon the report of a referee.

The summons in the action was for relief. The complaint set forth that, in the month of December, 1858, one Nathan Hofflin, at San Francisco, California, appointed the defendant, who then resided in that city, agent to sell for him certain property in California, then belonging to him, and to collect certain claims owing to him from persons in the state, and that the defendant accepted the trust and agreed duly to account to Hofflin for the proceeds of the sales and collections made by him as such

agent. It was further alleged that the defendant, as such agent, had received for the said Nathan Hofflin the sum of $4,153.75, in the gold coin of the United States, and had failed to account for the same to Hofflin, but had converted the same to his own use. That the said Nathan Hofflin, for value, assigned his claim for said funds, or the proceeds thereof, to the plaintiff; and that, though requested by the plaintiff since the assignment, the defendant refused to pay him the gold coin or its proceeds, and that by reason thereof he had sustained damage, etc.[6] * * *

DWIGHT, C. On the appeal from the judgment, the defendant claims that the referee should have dismissed the complaint, on the ground that, as the summons is for relief,[7] and according to his view, the action is in tort for the conversion of gold, and the claim is for $10,000 damages, consequent on the tort, the plaintiff cannot recover on contract merely for a debt due.

I do not think that the present action is framed in tort. The allegations are all such as would be properly made if one sought to recover from his agent on an accounting. The complaint alleges the employment of the defendant, his receipt of Hofflin's money, the failure of the defendant to account for the money or the proceeds, or to pay the same to Hofflin, and his refusal to pay the money or the proceeds to the plaintiff, though requested to do so. These allegations plainly are framed on the view that the defendant was bound to make over not specific money, but only to give that or its proceeds, or in other words, simply to account, in his character of agent. An action to hold him upon this liability is an ordinary action upon contract. It is true that, in connection with these statements, it is asserted that the defendant "converted the property to his own use." This is, however, merely surplusage. Under all the circumstances, it is an immaterial allegation. It is a mere deduction from the statement of fact, and in the connection in which it is used, it is not traversable. Conaughty v. Nichols (42 N. Y. 83) is in point. The complaint in that case was framed on the theory of an agency, and there were sufficient allegations to show the defendant's duty to account. Then there followed a statement that the defendant refused to pay, and had "con-

6 Parts of the statement and opinion omitted.

7 That is, the summons stated that the plaintiff would apply to the court for the relief demanded in the complaint. See Ross v. Mather, 51 N. Y. 108.

verted the plaintiff's property to his own use." The court held that if the words "converted the same to his own use," had been omitted there would have been a complete cause of action upon contract. These words were unnecessary to be stated, and superfluous. Their insertion, accordingly, had no effect upon the cause of action, and the plaintiff was allowed to recover. I think that this case was rightly decided, though it has met with some criticism.

The true theory of that case is that the words as there used were a mere legal conclusion, drawn by the pleader from the facts which he had averred. The pleader had stated facts from which that conclusion did not logically follow. It is not legally true that a commission merchant who has sold goods and received the price does, by retaining the price, convert it to his own use, so as to make him liable in an action of trover. (Walter v. Bennett, 16 N. Y. 250.) Had it been the correct exposition of the law that such retention is truly a conversion, and had the allegations been framed on such a theory, I concede that the plaintiff could not, upon the authorities, recover upon proof which showed the defendant to be liable upon a contract. (Walter v. Bennett, supra.) That, however, is not the case. Conaughty v. Nichols, considered from this point of view, is perfectly sound, and only maintains that an action upon a contract does not cease to be such because it contains an incorrect legal conclusion having the aspect of a tort. See also Ledwich v. McKim (53 N. Y. 307-316), where the principle in Conaughty v. Nichols is approved.

This view in no respect conflicts with Ross v. Mather (51 N. Y. 108). That was an entirely different case. The complaint in that case contained all the elements of a complaint for fraud. The averments were not conclusions of law, as in the allegations of conversion in Conaughty v. Nichols, and in the case at bar, but statements of specific facts. There was, among other things, a positive averment of a false statement, and of knowledge, on the part of the defendant, of its falsity, and of the fact that the purchaser was fraudulently deceived. These statements were absolutely necessary to the action, considered as an action of tort. They were out of place in an action on the contract. The court held that the plaintiff could only recover on the theory of a fraud. A case so different in its facts is no authority for overruling Conaughty v. Nichols. The cases may well stand

together. The court, in Ross v. Mather, did not intend to go counter to that case (page 112). It also holds that the fact that the summons is for relief is immaterial. The same remark must be made as to the prayer for damages. The present case is put distinctly on the ground that no other action would lie against the defendant, except one upon contract. (Walter v. Bennett, 16 N. Y. 250; Weymouth v. Boyer, 1 Ves. Jr. 416; Harris v. Schultz, 40 Barb. 315.) The allegations are sufficient to sustain that view, and the statement of a conversion is an erroneous legal conclusion from the facts averred, in its nature not traversable, and doing no possible harm to the defendant.[8]

Judgment affirmed.

FREER v. DENTON.

Court of Appeals of New York, 1875. 61 N. Y. 492.

The complaint in this action alleged that the parties, on the 13th day of May, 1869, entered into a contract which was set forth, by which defendant agreed to sell and to convey certain premises to the plaintiff at a specified price per acre, which plaintiff agreed to pay as follows: Ten dollars at the time of the execution of the contract, $800 July 1st, 1869, and the balance "on or before the 1st day of April, 1870." Defendant agreed, on receiving such payment at the time and in the manner mentioned, to convey the premises by warranty deed free of incumbrances. The complaint then set forth that plaintiff was induced to enter into the contract by means of various false and fraudulent representations on the part of defendant as to his title, and that relying on the same he paid the said sum of $800.

[8] And so in Sparman v. Keim, 83 N. Y. 245 (1880), where the complaint alleged that the plaintiff was an infant and had been induced to invest money in the defendant's business on the false and fraudulent representations that large profits would be realized, and a recovery was allowed on the theory of an infant's right to disaffirm. Semble contra, Walter v. Bennett, 16 N. Y. 250. See also Supervisors v. Decker, 30 Wis. 624 (1892), where a complaint framed on the theory of a conversion of money by a public officer and insufficient on that basis, was not sustained as a count for money had and received.

The defendant was unable to, and expressly refused to, carry out the contract, and notified plaintiff that he would neither perform, nor pay back the money received, and judgment was demanded for the money so paid, and also for damages.

The answer put in issue all the allegations contained in the complaint, except the execution and delivery of the contract, and alleged readiness and willingness to perform, and an offer of performance on the part of the defendant.

The plaintiff proved that he paid ten dollars on the execution of the contract, and $800 on the 15th day of July, 1869; and he gave evidence tending to show that, before the 22nd day of March, 1870, he was ready and willing to perform the contract on his part, and pay the balance of the purchase-money, and offered to do so, and that he demanded a conveyance; that the defendant was not able to give title to the Schoonmaker lot, and refused to perform the contract on his part, and absolutely repudiated the same; that the plaintiff then demanded back the money which he had paid, and the defendant refused to pay the same. It appeared that this action was commenced on the 23d day of March, 1870. The defendant called witnesses to controvert the evidence on the part of the plaintiff, and the judge holding the Circuit ruled, both upon a motion to nonsuit and in his charge to the jury, that the plaintiff could recover the money paid by him if he was ready and offered to perform and the defendant refused to perform and repudiated the contract, without the proof of any fraud; and that the action could be commenced before the 1st day of April, 1870.

To these rulings of the court defendant's counsel duly excepted. The jury found for the plaintiff, and rendered a verdict in his favor for the $810, and interest.

Earl, C.—The plaintiff did not prove the frauds alleged in the complaint, and no question of fraud was submitted to the jury. If, therefore, this was, under the complaint, necessarily an action of fraud, the plaintiff should have been defeated.

Upon the facts stated in the complaint, the plaintiff could recover the money paid by him upon either one of two theories: (1) He could avoid and repudiate the contract on the ground of the fraud alleged, and recover back the money, because it had been obtained from him by fraud, and the defendant had no right to retain it; or (2), he could rescind the contract, because the defendant refused to perform and repudiated the same, and

thus held his money without any consideration therefor.

Upon either theory the action is based upon the promise to pay back the money implied by law (Byxbie v. Wood, 24 N. Y. 607), and is one, therefore, upon contract. An action for money had and received lies, in all cases, where one has had and received money belonging to another without any valuable consideration given on the receiver's part, for the law construes this to be money had and received for the use of the owner only, and implies that the person so receiving promised and undertook to account for it to the true owner; and in case a defendant be under an obligation, from the ties of natural justice, to refund money, the law implies a debt, and gives this action founded on the equity of the plaintiffs' case. (3 Bl. Com., 163; Cobb v. Dows, 10 N. Y. 335; Moses v. Macferlan, 2 Burr., 1005). No error was, therefore, committed at the Circuit in the holding that the plaintiff was not bound to prove his allegations of fraud.

The facts stated in the complaint showed two causes of action, one to recover back the money paid, because the defendant refused to perform and repudiated the contract, and this was made out without proof of any fraud; and another to recover back the money paid, on the ground that it was obtained from the plaintiff by fraud. These two causes of action could be united in the same complaint, but should have been separately stated. No objection was, however, made that they were not thus stated, and such an objection could only be made by motion. (Bass v. Comstock, 38 N. Y. 21.)

The only other question to be considered is, whether the action could properly be commenced before the 1st day of April, 1870.

* * *

Judgment affirmed.

BAILEY v. MOSHER.

Circuit Court of Appeals, 1894. 63 Fed. 488.

CALDWELL, Circuit Judge. This action was brought in the district court of Lancaster county, Neb., by Thomas Bailey, the plaintiff in error, against Charles W. Mosher, Homer J. Walsh, Rolla O. Phillips, Charles E. Yates, Ellis P. Hamer, Ambrose P.

S. Stewart, and Richard C. Outcalt, the defendants in error, and removed into the circuit court of the United States for the district of Nebraska on the petition of the defendants, upon the ground that the suit was one arising under the laws of the United States. A motion to remand the cause to the State court was overruled, and a demurrer to the complaint was sustained, and final judgment entered for the defendants; whereupon the plaintiff sued out this writ of error, assigning for error these rulings of the circuit court. The petition alleges the plaintiff loaned the Capital National Bank of Lincoln $11,500, and seeks by this suit to recover the same from the defendants, who were directors of the bank, upon grounds to be presently stated.

We have found it necessary to consider only two of the many questions discussed in the briefs of counsel. It is earnestly contended that this is not a suit arising under the laws of the United States, but is an action for deceit, with which the national banking act has no connection.

The soundness of this contention must be tested by the averments of the petition. The petition states a single cause of action, founded wholly upon the alleged misfeasance and nonfeasance of the defendants in their capacities as officers and directors of a national bank. The alleged official misconduct of the defendants which is relied upon as stating a ground of action is particularly set out. It is alleged that they made false and misleading reports as to the condition of the bank to the comptroller of the currency, by which the plaintiff was deceived and misled as to the condition of the bank; that loans were made to persons in excess of the amount which could lawfully be loaned to any one person; that they made large loans to the president and cashier of the bank, in violation of the banking act, and declared and paid dividends when there were no earnings or profits out of which to pay them; that all these acts were violations of the national banking act, and of the duties of the defendants as officers and directors of the bank under that act; and the complaint concludes with the averment that, "by reason of the several violations of the banking law as above set forth," the defendants are liable to the plaintiff in the sum sued for. In view of the last averment of the petition it is difficult to perceive how the plaintiff can successfully maintain that this cause of action does not arise under a law of the United States.

It is said in the brief of the learned counsel for the plaintiff

in error that, if certain allegations of the petition state a cause of action for a violation of the national banking act, the preceding paragraphs state an independent cause of action for deceit. A petition containing a single paragraph cannot be made to subserve the purpose of two distinct and dissimilar causes of action. Kewaunee Co. v. Decker, 30 Wis. 624. We feel constrained to hold that, properly construed, the petition contains but one paragraph or count, and states but one cause of action, and that the cause of action stated is one for the misfeasance and mismanagement of the affairs of the bank by the defendants as its officers and directors. We cannot adopt the view of the plaintiff in error,—that those clauses of the petition which state, or tend to state a cause of action for deceit at common law, should be segregated from the other clauses of the petition, and held to constitute the statement of the cause of action. The court cannot reject the allegations of the petition which do state a cause of action under the banking act, for the purpose of converting mere matter of inducement or surplusage, contained elsewhere in the petition, into a substantive statement of a cause of action different from that which the petition in terms declares to be the foundation of the action.

The plaintiff was not bound to state the legal effect of the facts set out in his petition, but, having done so, he cannot complain if his adversary and the court accept and act upon his own theory. Especially is this so when the petition is ambiguous, and will support that theory as well or better than any other.

In the sense of the word, as used in code pleading, there is but one paragraph in this petition. The term "paragraph," as used in code pleading, means an entire or integral statement of a cause of action. It is the equivalent of "count" at common law. It may embrace one sentence or many sentences; but, whether one or many, it constitutes a statement of a single cause of action. It is a requirement of some codes that, if the petition contains "more than one cause of action, each shall be distinctly stated in a separate paragraph and numbered" (Code Ark., Sec. 5027); and all of them require that each cause of action shall be separately stated and numbered.[9] The Nebraska Code provides that, "where the petition contains more than one cause of

[9] For the provision of the New York Code on this subject, see note p. 3, ante.

action, each shall be separately stated and numbered." Consol. St., Neb. 1891, Sec. 4633 (93). And the Supreme Court of that state, construing this section, have said: "A plaintiff cannot jumble his causes of action together." Bank v. Bolling, 24 Neb. 821, 40 N. W. 411. If, in drafting the petition, the pleader supposed he was stating more than one cause of action, he would undoubtedly have separately stated and numbered them, as required by the Nebraska Code. No one can point out in this petition where the statement of one cause of action ends and another begins. The plaintiff cannot reform or amend his petition in this court. If it were possible to spell out of the averments of this petition, taken separately or together, an action for deceit, the court would be precluded from attaching that meaning to them by the positive statement contained in the petition itself that the action is grounded on the "violations of the banking law" therein set out. Section 5239 of the Revised Statutes of the United States provides that:

"If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. * * * And in cases of such violation, every director who participated in, or assented to, the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation."

It is obvious that the plaintiff, in the inception of this case, had in view the enforcement of the defendants' liability under the last clause of this section. Under section 2 of the judiciary act of August 13, 1888, a removal cannot be sustained upon a statement, in the defendant's petition therefor, that the suit is one arising under the laws of the United States, but that fact must appear by the plaintiff's statement of his own claim. Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654. In this cause the plaintiff's petition does disclose that the cause of action is one arising under the laws of the United States. Tennessee v. Davis, 100 U. S. 257, 264; Cooke v. Avery, 147 U. S. 375, 13 Sup. Ct. 340; Walker v. Bank, 5 U. S. App. 440, 5 C. C. A. 421, 56 Fed. 76.

The petition shows that the bank of which the defendants are

officers and directors is insolvent, and has passed into the hands of a receiver appointed by the comptroller of the currency under the national banking act. The liability of the defendants, whatever it may be, for the acts complained of in the petition, is an asset of the bank, belonging equally to all of the creditors in proportion to their respective claims, and cannot be appropriated, in whole or in part, by a single creditor to the exclusive payment of his own claim. It is the policy of the national banking act to secure the ratable distribution of the assets of an insolvent national bank among all its creditors. Assuming that the defendants are liable in damages for the acts complained of in the petition, they are liable at the suit of the receiver, who is the statutory assignee of the bank, and the proper party to institute all suits for the recovery of the assets of the bank, of whatever nature, to the end that they may be ratably distributed among its creditors. Rev. Statutes U. S., Sec. 5234; Kennedy v. Gibson, 8 Wall. 498; Bank v. Colby, 21 Wall. 609; Hornor v. Henning, 93 U. S. 228; Stephens v. Overstoltz, 43 Fed. 771; Bank v. Peters, 4 Fed. 13. The law will not allow one creditor to appropriate the whole liability of the directors to his own benefit. It is well settled that an injury done to the stock and capital of a corporation by the negligence or misfeasance of its officers and directors is an injury done to the whole body of stockholders in common, and not an injury for which a single stockholder can sue. Smith v. Hurd, 12 Metc. (Mass.), 371; Howe v. Barney, 45 Fed. 668. The same rule applies to the creditors of a corporation. But it is said the plaintiff is not suing as a creditor of the bank, or for its mismanagement, but for the fraud and deceit practiced upon him through the defendants' report to the comptroller of the currency by which he alone was damaged. As we have seen, the frame of the petition will not support this contention. The motion to remand was properly overruled, and the demurrer to the petition rightly sustained, upon the ground that the plaintiff is not the proper party to sue for the cause of action stated in the complaint as we construe it. These rulings make it unnecessary to express any opinion upon the other questions so fully and ably argued by counsel. The judgment of the circuit court is affirmed.

GARTNER v. CORWINE.

Supreme Court of Ohio, 1897. 57 Ohio St. 206.

Williams, J.: Suit was brought by Corwine against Gartner to recover damages for breach of warranty in the sale of a horse. The petition alleges, in addition to the warranty and its breach, that the defendant knew, at the time of the sale, that the animal was not what it was warranted to be. On a trial of the issues joined by a denial of the warranty and its breach, and of the defendant's knowledge that the warranty was false, the jury were instructed, in substance, that, to entitle the plaintiff to a verdict in the case, it was necessary for him to prove, by a preponderance of the evidence, that the defendant knew the warranty was false in some material particular, or had reason to believe it to be false. The judgment rendered on the verdict, which was for the defendant, was reversed for error in giving the foregoing instruction; and, upon the question concerning which the courts below entertained different opinions, the case has been ordered to be reported.

The contention of the counsel for the plaintiff in error appears to be that the effect of the averment charging the defendant with knowledge of the falsity of the warranty was to make the action one for deceit or fraud, and therefore proof of such knowledge was essential to plaintiff's right of recovery; otherwise the petition would include two inconsistent causes of action which could not be joined. The code permits the plaintiff to state the facts which constitute his cause of action; and when, upon any of the facts so stated, he is entitled to recover, he cannot be denied that right because he has alleged other facts that he is unable to prove. A warranty in a sale of chattel property is a part of the contract, and the warrantor is bound by it, and answerable in damages for its breach, though he may have honestly believed the article to be as warranted. But the representations of the seller may fall short of an express warranty, and yet may be such as to induce the purchaser to rely upon them, and entitle him to redress against the seller if the latter knew they were false, or recklessly made them without reasonable ground for believing them to be true. And which of these phases of his case the purchaser may be able to sustain by proof can only be determined on the trial; but proof of either entitles

him to relief. And it is competent, we think, for the plaintiff to state in his pleading all the facts of the transaction which enter into his right to recover, as he believes them to be, though they present different grounds of recovery, and admit of different modes or measures of relief, and to ultimately have that relief to which the allegations proved showed him entitled. The petition of the plaintiff alleges an express warranty of the horse, and a breach of that warranty, and his right to recover damages resulting from that breach was not affected by the allegation of the defendant's knowledge of the falsity of the warranty. The latter allegation did not, as counsel for the plaintiff in error contends, change the action to one exclusively for deceit, nor is it inconsistent with those upon the warranty. They may all be true. Whether there is more than one cause of action stated in the petition is a question upon which differences of opinion may exist. But it need not now be determined. If there are two—one for breach of the warranty, and the other for fraud, they grew out of the same transaction, and may properly be joined[10] in the same petition; and, no motion having been made to require them to be separately stated, that objection to the petition, if it were open to it, was waived by answer.[1] In favor of the view that there is but one cause of action stated, it may be said that there was but a single transaction between the parties (the negotiations resulting in the sale of the horse); there was but one wrong of the defendant (the sale of an unsound animal as and for a sound one); and there is but one right of the plaintiff growing out of the wrong, and that is to have redress for the injury he sustained in consequence of it, and for which he can have but one recovery. And a statement of all the facts of the transaction, with a demand for the relief desired, as one cause of action, seems more in harmony with our reformed system of pleading than a repetition of them, which becomes necessary, in part at least, in their statement as separate causes of action. But, in either event, whether the petition states but one cause of action or two, the plaintiff, upon proof of the warranty, and that it was broken, to his damage, was entitled to a verdict, notwithstanding he failed to

10 See Harris v. Simplex Tractor Co., 140 Minn. 278, (1918).

1 That the failure to state two or more causes of action separately is not a ground for demurrer, and can only be taken advantage of by motion. See Bass v. Comstock, 38 N. Y. 21, post.

establish by proof the defendant's knowledge that the warranty was false; and, as this right was denied him by the instruction given to the jury, the reversal of the judgment for that reason was not error.[2]

Judgment affirmed.

ROGERS v. DUHART.

Supreme Court of California, 1893. 97 Cal. 500.

Paterson, J.: The complaint alleges that the executors of the estate of Miguel Leonis let and demised unto the plaintiff certain lands belonging to the estate for the term of eight months from and after Feb. 1, 1891, and thereupon the plaintiff took possession and has ever since held the same; that on Feb. 1, 1891, the defendant "entered upon the plaintiff's said described

2 See Stanley v. Day, 185 Ky. 362, (1919), to the effect that an action for a breach of warranty is not converted into a tort case by an allegation of scienter. In Marsh v. Webber, 13 Minn. 109, (1868), it was thought that a count should not be so drawn as to embrace both a breach of warranty and a fraud, but the objection ought to be taken by motion to elect or to strike out. In Knapp v. Walker, 73 Conn. 459, (1900), it was apparently ruled that the two causes might properly be stated in a single count. (For the usual requirements of separate statements in such cases, see the section on Joinder of Causes of Action).

For the view that a complaint like that in the principal case should be construed as stating a case for fraud only, and hence would not support a recovery for breach of warranty merely, see Ross v. Mather, 51 N. Y. 108, (1872); Pierce v. Carey, 37 Wis. 232, (1875). Compare Williamson v. Allison, 2 East, 446, (Court of K. B. 1802), to the effect that a false warranty without scienter, is a tort, and hence the scienter, though alleged, need not be proved. And so in Lassiter v. Ward, 33 N. C. 443, (1850 before the adoption of the code).

Some of the difficulties that may arise, where a complaint is construed as embracing both a tort and a breach of contract, appear in Frechette v. Raon, 145 Wis. 589, (1911); there a complaint against a surgeon, clearly framed for negligence, incidentally stated enough to amount to a breach of the contract to treat plaintiff, and defendant pleaded the statute of limitations which has run against the tort claim, but not against the contract claim.

property, and drove into and kept upon the said land about 400 head of cattle, and about 3,000 head of sheep, and trod down and depastured and destroyed all the grass and herbage thereon, and so kept the said cattle and sheep upon the same continually thereafter and until on or about the 17th day of April, 1891, without the consent of the plaintiff, and to his damage in the sum of $2,000." The facts of the case are not disputed. They show that defendant had the right to pasture 400 head of cattle upon the lands until the first day of September, 1890; that, after his right expired, the executors gave him "permission to pasture upon the said lands his gentle band of cattle, consisting of 50 or 60 head, until the 31st of December, 1890, in consideration of the said defendant watching over the place and keeping the cattle of all other parties off;" that at the time of giving said permission the executors notified the defendant "that he must remove his cattle on the 31st day of December, 1890, and that under no consideration was the defendant, Duhart, to keep or to allow any sheep to run upon the said ranch, and that was the only permission given the defendant, by either of the executors, to be or have its cattle upon the said ranch after Sept. 1, 1890;" that a few days after Sept. 1st, one of the executors told the defendant to remove his cattle from the ranch, and that he gave said executor "to understand that he had removed them, though he did not state so in so many words, (he stated that he had sold them, or was about to sell them;) that the defendant permitted 2,000 head of sheep, 300 head of cattle, and 25 head of horses belonging to him to graze upon the land in question from Jan. 1, 1891, until April 17, 1891; that neither the plaintiff nor the executors had knowledge of the fact that the plaintiff's (defendant's?) sheep, cattle, and horses were upon the lands subsequent to December 31st, 1890, but supposed that he had removed them from the premises, in accordance with his instructions, and that they did not know that he had abused the privilege granted to him on or about Sept. 1, 1890; that the lands described in the complaint were uninclosed pasture lands, and that neither plaintiff or any one on his behalf took possession of the land or any part thereof until about the 12th day of April, 1891; that plaintiff has sustained damages in the sum of $900 by reason of the wrongful act of the defendant, as charged in the complaint.

The briefs are devoted chiefly to a discussion of the question

whether an action trespass *quare clausum fregit* can be maintained by one who was not in the actual possession of the land at the time the acts complained of were performed. The respondent refers to cases showing that actual possession is not in all cases essential, and the appellant insists that the exceptions are confined to cases in which the plaintiffs were the owners,—where the title draws to it the possession for the purpose of redressing injuries to the estate. It would be a useless thing to attempt to reconcile the cases on this subject. Decisions adhering to the common law rules of pleading are seldom of any value in determining the sufficiency of a pleading under the code, and sometimes lead to serious departures from its letter and spirit. With us, mere forms of action are cast aside. Every action is now in effect a special action on the case, (Jones v. Cortes, 17 Cal. 487; Goulet v. Asseler, 22 N. Y. 225; Matthews v. McPherson, 65 N. C. 189; Brown v. Bridges, 31 Ia. 145;) and the rigid formalism and subtle distinctions found in the rules governing the common law forms of action are as inapplicable and inane under the modern plan of procedure as the highly dramatic speech, senseless repetitions, and symbolic gestures of the formulae prescribed for the five forms of the civil actions by the decemvirs of ancient Rome. Does the complaint state in ordinary and concise language facts sufficient to constitute a cause of action? That is the question, and not whether it is sufficient to show trespass *quare clausum,* trespass *vi et armis,* or any other technical form of action, *ex delicto* or *ex contractu.* The common law rule is that, if plaintiff declare in trespass *quare clausum* where the action should be case, he will be nonsuited at the trial; but under our system, if the facts alleged and proved are such as would have entitled the plaintiff to relief under any of the recognized forms of action at common law, they are sufficient as the basis of relief, whatever it may be. The bill of exceptions herein states facts which would entitle plaintiff to relief in an action on the case, which includes torts not committed with force, actual or implied, injuries committed to property of which plaintiff has the reversion only, and in fact all injuries not provided for in other forms of actions. The fact that the plaintiff alleges he was in possession is immaterial. The allegation may be treated as surplusage. "Superfluity does not vitiate." "The nature of the right of action has not been changed, nor has the amount of damages recover-

able been effected; but the special and the technical rules which govern the use of the two common law actions mentioned (trespass and case) have certainly been abrogated." Pom. Rem. & Rem. Rights, § 232. The damages recoverable in the common law action of trespass *quare clausum* are for the wrong done to the plaintiff's possession as well as to the inheritance, and, where the entry is with actual force, treble damages are frequently allowed. While the plaintiff is not permitted to recover such damages under the facts proved in the case, he is certainly entitled to recover such damages as would have been recoverable if the action were the common law "action of case."[3] To hold that the plaintiff could not recover would be to restore the old distinctions between these technical actions. Section 232, supra, note 2. There is nothing decided in any of the cases upon which the appellant relied opposed to the views which we have expressed. The statements upon this subject in Holman v. Taylor, 31 Cal. 340, and Pollock v. Cummings, 38 Cal. 685, are dicta. In Uttendorfer v. Saegers, 50 Cal. 497, it was alleged that the defendant forcibly entered upon the premises, and tore down the buildings, etc. It was claimed by the appellant that the action was trespass *quare clausum*. Respondent denied this, asserting that it was an action by the owner for damages done to the inheritance. The court held with the appellant, but did not hold that the action could not be maintained unless the plaintiff was in possession. The case simply holds that evidence of the possession of the tenant was material on the question of damages. The question of the sufficiency of the complaint or of the facts found to constitute a cause of action in case was not considered in any of the cases referred to. In Heilbron v. Heinlon, 72 Cal. 371, (14 Pac. 22), the court held that the defendants were entitled to show that at the time of the acts charged in the complaint they were in quiet and peaceable possession of the land, claiming the same under certificates of purchase and patents, and had continuously used and occupied it for 10 or 11 years prior to the commencement of the action. The decision followed the doctrine announced in Page v. Fowler, 37 Cal. 100, viz.: that a personal action cannot be made the means of litigating and determining the rights to the possession of real prop-

[3] See same result in Brown v. Bridges, 31 Ia., 138 (1870), under a complaint alleging ownership and possession, and a wrongful entry and destruction of fences, etc.

erty, as between conflicting claimants. In Bank v. Turman, (Cal.) 30 Pac. Rep. 966, it appeared that the plaintiff did not have title, and he neither had possession nor the right of possession. In the case at bar there is no pretense that the defendant was claiming adversely to any one. He vacated the premises promptly upon receiving a written notice on behalf of plaintiff demanding possession, and so states in his answer. He was never, at any time, after Sept. 1st, 1890, a tenant. Admitting that, when a tenancy is shown, the presumption from his continued possession is, that he holds in the same capacity, there is here shown an express agreement, by the terms of which he was simply to have the privilege of pasturing 50 or 60 head of cattle on the land, in consideration of his services in caring for the property, and seeing that other stock did not trespass on the land. The presumption is, therefore, overcome. Bertie v. Beaumont, 16 East 33. Defendant contends that he was a tenant at sufferance after Dec. 31, 1891, but this is a mistake; he was a mere servant. Haywood v. Miller, 3 Hill 90; Robertson v. Georgia, 7 N. H. 308. His possession was the possession of his employer. He could not have maintained an action against anyone for trespass, nor would he have been a necessary party plaintiff with the owner in a suit to recover damages for an injury to the property. Ogden v. Gibbons, 5 N. J. Law 599. Whether he be regarded as a servant or licensee, the result is the same. He was there for a particular purpose, and the moment he abused the privilege, or committed any act hostile to the interest of his employer or licensor, he became a trespasser. Lyford v. Putnam, 35 N. H. 563; Looram v. Burlingame, 16 La. Ann. 199; People v. Fields, 1 Lans. 222; Haskin v. Record, 32 Vt. 575.

Judgment and order affirmed.

JOSEPH DESSERT LUMBER CO. v. WADLEIGH.

Supreme Court of Wisconsin, 1899. 103 Wis. 318.

Action by the Joseph Dessert Lumber Co. against Matthew Wadleigh. There was a judgment of non-suit, and the plaintiff brings error.

The complaint in this action, omitting the formal allegations, is as follows: "That, during the winter of 1896 and 1897, the defendant unlawfully, and with force, broke and entered upon the plaintiff's land in the county of Marathon, and state of Wisconsin, known and described as follows, to-wit: Lots 6 and 16 of section 18 in township 26 north, of range 9 east, and there cut down and carried away trees and timber belonging to the plaintiff, of the value of $170, and converted and disposed of the same to his own use, to the damage of the plaintiff $170." The answer was a general denial. On the trial, plaintiff made proof that about 15,000 feet of timber had been cut on the lands described; that eight of these logs were found, with a lot of other logs, banked on Plover River, about three miles from this land; that the stumpage value was $4 to $5 per 1,000 feet, and the logs on the bank were worth about $8 per 1,000 feet; and that the logs at the banking place had been cut by one Luchia, and had been sold by him to defendant on the bank. It was admitted that the defendant got the logs that were on the bank, drove them to his mill, sawed them into lumber, and sold the lumber. At the close of plaintiff's testimony, the defendant moved for a non-suit, on the ground that the cause of action stated was for injury to the lands, and no proof had been offered to connect the defendant with the cutting, or transportation of the logs from the land. This motion was granted, and a judgment for costs was entered in favor of the defendant. Plaintiff brings the case to this court by writ of error.

BARDEEN, J. While it is true that the code has abolished the distinctions between actions at law and suits in equity, and has provided that there shall be but one form of action for the enforcement and protection of private rights and the redress and prevention of private wrongs, yet there still exist certain elements or features pertaining to actions which are unchanged thereby. These do not belong to the action as a judicial instrument for establishing a right, but inhere to and belong to the primary and remedial rights themselves. For the enforcement and protection of these rights but one form of action exists, but, as to the remedies which lie back of all forms of actions, the law still recognizes and observes distinctions which are as vital as before the code. It is just as necessary today as it ever was that a suitor should so state his cause of action that the court may determine whether it be *ex contractu* or *ex delicto*. In the

one case the plaintiff would have to be satisfied with a mere money judgment, while in the other an order of arrest might issue, and an execution against the body. This certainty of statement is also important for the purpose of determining the proper tribunal for the trial of the action. Under the law, certain actions are local to the extent that the trial thereof may be compelled in the county where the property affected is situated. It is therefore quite essential that the complaint should be sufficiently specific in allegation as to enable the parties and the court to say whether the action be local or transitory. It is these primary rights created by the law, and the wrongs committed against them, and the remedial rights resulting from such wrongs, which are to be considered in the practical administration of justice, and which remain unaffected by the reform legislation. When a complaint is presented for judicial inspection, it is the court's first duty to ascertain the nature of the cause of action alleged, as well to protect the rights of parties as to the place of trial as to administer the proper remedy. It is suggested that the complaint in this action has a double aspect, and may be either what was called in the old practice a complaint for trespass to lands or one of trover for the conversion of the timber. The language of Chief Justice Dixon in Supervisors v. Decker, 30 Wis. 624, seems especially applicable to the contention of the plaintiff's counsel in that regard. He says: "It would certainly be a most anomalous and hitherto unknown condition of the laws of pleading, were it established that a plaintiff in a civil action could file and serve a complaint, the particular nature and object of which no one could tell, but which might and should be held good as a statement of two or three or more different and inconsistent causes of action, as one in tort, one upon money demand on contract, and one in equity, all combined or fused and moulded into one count or declaration; so that the defendant must wait the accidents and events of trial, and until the plaintiff's proofs are all in, before being informed, with any certainty or definiteness, what he is called upon to meet. The proposition that a complaint, or any single count of it, may be so framed with a double, treble, or any number of aspects, looking to so many and incongruous causes of action, in order to hit the exigencies of the plaintiff's case or any possible demands of his proof at the trial we must say, strikes us as something novel in the rules of pleading."

Counsel for plaintiff in error contends that his complaint may be considered one in trover for the recovery of the value of certain timber cut from the plaintiff's land. He admits that it has "some aspects" of a complaint in trespass. After reading the complaint, we are convinced that that admission was advisedly made. It not only has some of the aspects of such a complaint, but the very likeness of such pleading. In its formal allegations, it is almost an exact reproduction of the complaints found in the form books for injuries to real estate by cutting timber. Abb. Forms 470. It has all the attributes of a complaint for trespass *quare clausum*. It alleges the entry upon the plaintiff's land, the cutting of the timber, the carrying of the same away, and conversion to the use of the defendant. It was no doubt intended for just what it appears on its face to be,—a complaint for unlawful entry and cutting of plaintiff's timber. There was an absolute failure of proof in this regard. No proof was offered connecting the defendant with the cutting of any of the timber, or with any entry on the land. But it is said that a recovery in this case could have been sustained under that portion of the complaint which alleges a conversion of the logs by the defendant. The allegation that defendant converted the logs to his own use was but a statement of damages consequent to the illegal entry to the land. A very similar complaint was considered in Merriman v. Machine Co., 86 Wis. 142, (56 N. W. 743). There was a motion to make the complaint more definite and certain, on the grounds that it alleged trespass, trover, and conversion, and injury to business credit. The court said: "There is but one cause of action, and that is trespass *quare clausum fregit*, and the other continuous acts of the defendants are stated as the consequential damages arising therefrom and connected therewith." The argument of the counsel that the complaint was framed to meet all the contingencies of the proof is evidently an afterthought. The counsel is too well versed in the law to make that suggestion, except as a last resort. The plan of "hitting it if it is a deer, and missing it if it is a calf," does not prevail in legal proceedings. "All that goes to the administration of justice should be definite and certain. This is almost equally essential to the claim, the defense, and the judgment. When these become vague and loose, the administration of justice becomes vague and loose, with a tendency to rest, not so much on known and fixed rules of law, as on capricious judg-

ment of the peculiarities of each case, on a dangerous and eccentric sense of justice, largely personal to the judges, varying as cases vary, rather than on abiding principles of right, controlling equally the judgments of courts and the rights of suitors." Pierce v. Cary, 37 Wis. 232.

Again, it is said that the evidence of the conversion came in without objection for variance, and therefore plaintiff was entitled to judgment. The difficulty with this position is that such evidence was proper, under the complaint to show consequential damages. The defendant was not bound to anticipate that there was to be a failure of proof of the substantial matters alleged as a basis of the cause of action. When the plaintiff's case ended, he took the only course open by moving for a non-suit for failure of proof. The plaintiff stood upon its complaint as being one for conversion. It departed entirely from the original purpose and scope of the action, and sought to make the allegation of consequential damage stand as the substance of the cause of action alleged. That this was not permissible seems evident, when we come to consider that, in the one case, the action is local, and triable in the county where the land is situated; and, in the other, transitory and triable in the county of the defendant's domicile. A complaint cannot be made to serve the purpose of a dragnet.

It is further suggested that the action can be supported as one under section 4269, Rev. St., and that the defendant can be made liable as a purchaser of the logs from the original wrongdoer. That section refers to trespassers and purchasers "with notice" of such unlawful cutting. There was no proof that the defendant had any such notice. So far as the evidence discloses, the defendant was an innocent purchaser of the logs without notice, and, without allegation and proof connecting him with the original wrong done, the action cannot be sustained under that section. See Tuttle v. Wilson, 52 Wis. 643 (9 N. W. 822). The case of Swift v. James, 50 Wis. 541 (7 N. W. 656), comes the nearest to sustaining the plaintiff's contention of any in the books. It is an extreme case, and must be limited to the facts as therein disclosed. The complaint alleged an unlawful entry upon lands in Michigan, the cutting of timber, the carrying away, and a conversion of the same in the cities of Milwaukee and Chicago. The opinion says that, while the complaint might have been sustained as one for trespass *quare clau-*

sum, if the action had been brought in Michigan, yet, the suit having been brought in this state, where an action for the original trespass could not be maintained, the allegations of the original trespass might be treated as surplusage, and the action sustained here for conversion. The court evidently ignored the principle, recognized in Merriam v. Machine Co., supra, that the allegation of conversion was merely supplemental to the trespass alleged, and inserted to allow proof of the consequent damages. It is unnecessary to prolong this discussion. We feel quite clear that the cause of action alleged is for injury done to real estate and, there being no proof connecting the defendant therewith, the non-suit was proper. The judgment of the circuit court is affirmed.[4]

BRUHEIM v. STRATTON.

Supreme Court of Wisconsin, 1911. 145 Wis. 271.

KERWIN, J. The complaint in this action stated that the plaintiff was the owner of certain lands in Minnesota, and that between November, 1903, and March, 1904, the defendant unlawfully and wrongfully entered upon said land and without authority willfully and wrongfully cut standing live timber growing thereon and willfully and wrongfully took and carried

[4] See Wilson v. Haley Live Stock Co., 153 U. S. 39 (1893), to the effect that under the Colorado code, a plaintiff was not entitled to recover for money paid to obtain the release of certain cattle, under a complaint alleging the taking of the cattle, and the payment of money for their release, etc., where it appeared that plaintiff was not entitled to possession at the time the trespass was committed. Compare Bieri v. Fonger, 139 Wis. 150, (1909), where the complaint alleged a trespass to land and an assault and battery, apparently by way of aggravation, and the Court thought that even if there was not sufficient possession to support the charge of trespass to land, there still might be a recovery for the personal trespass. Compare Merriman v. McCormick, 86 Wis. 142, (1893), post p. —.

For the difficult questions which frequently arose in actions of trespass at common law, as to whether certain allegations should be treated as stating matters of aggravation merely, or distinct trespasses, see Bush v. Parker, Bingham's New Cases, 73 (1834).

the same away and converted the same to his own use, to the great injury and damage of the plaintiff, and further alleged the value of said timber converted and demanded judgment for that amount and also treble said amount as damages under the Minnesota statutes. The complaint also contains allegations setting up the statutes of Minnesota respecting willful trespass and single and treble damages. The defendant answered admitting that the Minnesota statutes set up in the complaint were in full force and effect in the state of Minnesota as alleged in the complaint, and denied every other allegation of the complaint.

The court below sustained an objection to any evidence under the complaint for the reason that it was a complaint in trespass upon lands in Minnesota, therefore the court had no jurisdiction of the action, and denied the application of the plaintiff to amend the complaint on the ground that it had no power or jurisdiction to allow such amendment for the reason that, the cause of action being one in trespass, the complaint could not be amended so as to set up a cause of action for conversion of the timber cut. We think the court below erred in both particulars. In the first place, there were sufficient allegations in the complaint to make a good cause of action in conversion, and what the idea of the pleader was when he drew the complaint was immaterial. If the allegations were sufficient to constitute a cause of action in conversion, the plaintiff was entitled to have it treated as such by the court, and the fact that the court had no jurisdiction of the action of trespass upon the land in another state rendered the allegations respecting a cause of action in trespass merely surplusage, and, there being sufficient allegations aside from these to make the complaint one in conversion, it should have been so treated by the court. Swift v. James, 50 Wis. 540, 7 N. W. 656; Bieri v. Fonger, 139 Wis. 150, 120 N. W. 862; Morse v. Gilman, 16 Wis. 504; Manning v. School District, 124 Wis. 84, 102 N. W. 356; Franey v. Warner et al., 96 Wis. 222, 71 N. W. 81; Emerson et al. v. Nash et al., 124 Wis. 369, 102 N. W. 921, 70 L. R. A. 326, 109 Am. St. Rep. 944. Doubtless the complaint as originally drawn would have been subject to a motion to make more definite and certain or to strike out the surplus allegations; but no such motion was made, and defendant answered on the merits. Hagenah et al. v. Geffert, 73 Wis. 636, 41 N. W. 967; Phillips v. Carver, 99 Wis. 561, 75 N. W. 432.

Respondent relies upon Dessert L. Co. v. Wadleigh, 103 Wis. 318, 79 N. W. 237. It will be observed, however, that was an action brought for trespass upon land in Wisconsin, which action the court had jurisdiction of. Moreover, the strict rule laid down there has not been followed by this court. In Bieri v. Fonger, supra, the court said, at page 155 of 139 Wis., at page 864 of 120 N. W.: "In the light of the very liberal rules for testing the sufficiency of pleadings and proceedings which have been declared in recent years and the progressive tendency to broaden the judicial vision as to the scope of section 2829, St. 1898, aforesaid, the criticism in Joseph Dessert L. Co. v. Wadleigh, supra, would hardly be made to-day. The general spirit of the decision as regards essentiality of technical accuracy in pleadings and necessity for a party to stand or fall, under all circumstances, by the particular cause of action he intended to plead, is not in strict harmony with the later day expressions and decisions."

It was also within the power of the court to allow the amendment which plaintiff asked, setting out the conversion more definitely. The cause of action set up in the complaint was a tort action, whether for trespass or conversion, and the power of the court to change from a cause of action in trespass to one in conversion, we think, is clear. It follows that the court erred in sustaining the objection to any evidence under the complaint, and also in refusing the amendment.

The judgment below is reversed, and the cause remanded for further proceedings according to law.[5]

BARNES, J. (dissenting). The main purpose of a complaint in an action is to advise the defendant of the nature of the cause of action against him. In an action for trespass for cutting timber, where the trespasser reduces the logs to posses-

[5] In Swift v. James, 50 Wis. 541, and McGonigle v. Atchison, 33 Kan. 726, the complaints set up foreign trespasses and the conversion of things severed from the land, but did not rely on the foreign statute. See also Jacobus v. Colgate, 217 N. Y. 235, (1916), where the complaint alleged the setting fire to and destruction of a building and personal property in another state.

For the contrary view, that even in such cases the complaint should be construed as stating, or attempting to state, a single cause of action for trespass to land with incidental damages, Ellenwood v. Marietta Chair Co., 158 U. S. 105, 1894, (under Ohio Code). Dodge v. Colby, 108 N. Y. 445, (1888).

sion and converts the same to his own use, it is entirely appropriate to allege, in a complaint in an action brought to recover damages for the trespass, that the trespasser has so converted the timber, because under the statute (section 4269) the plaintiff is entitled to recover the highest market value of the timber cut while in the possession of the trespasser. These allegations relating to conversion, which form the basis for the enhanced damages which plaintiff expects to recover, might in themselves set forth sufficient facts to constitute a cause of action for conversion. But in an action for conversion the allegations of wrongful entry and of wrongful cutting are entirely inappropriate. A defendant is entitled to know whether he is being charged with a trespass on real estate or with a conversion of personal property. The complaint in the action before us could not be made the subject of a motion to make it more definite and certain or to compel the plaintiff to elect as to which of two causes of action he would rely upon, because it contained the necessary averments to constitute a cause of action in trespass with no unnecessary or redundant allegations in reference to such a cause. The original complaint, the first amended complaint, and the proposed amendments to the first amended complaint, all clearly stated a cause of action in trespass. The pleader intended to set forth such a cause, not only because a cause of action in trespass was stated, but because plaintiff claimed the benefit of a statute and of decisions of Minnesota applicable to actions for trespass for cutting timber, by which his damages were enhanced largely beyond the actual injury sustained. The complaint is precisely such a complaint as this court held, in Joseph Dessert Co. v. Wadleigh, 103 Wis. 318, 79 N. W. 237, stated a cause of action in trespass and did not state a cause of action for conversion, and it is just such a complaint as the court again held, in Grunert v. Brown, 119 Wis. 126, 95 N. W. 959, stated a cause of action in trespass and did not state a cause of action for conversion. Some of the discussion in the Dessert Co. Case was not approved in Bieri v. Fonger, 139 Wis. 150, 120 N. W. 862; but the court expressly stated that the criticism indulged in did "not impair the decision in that case, but only softens somewhat the logic of the discussion." See further Klipstein v. Raschein, 117 Wis. 248, 94 N. W. 63. So we have at least three comparatively late causes decided in this court passing upon the precise point involved

which expressly sustain the view adopted by the trial judge, and none to the contrary. It has been suggested that, because our courts could not grant relief for a trespass committed on lands in the state of Minnesota, the complaint should have been construed as intending to state a cause of action in conversion. This argument is no more persuasive than a like argument in Grunert v. Brown, where the plaintiff was remediless in trespass because the right of action was barred by the statute of limitations; whereas, the statute had not run on a cause of action for conversion, if one were stated.

The trial court exercised its discretion to refuse to permit an amendment on the trial changing the cause of action from trespass to conversion. At the time the amendment was sought to be made, it appeared from the face of the proposed amended complaint that the cause of action for conversion was barred by the statute of limitations, although such was not the case when the summons was served in the trespass action. Under these circumstances, under the decisions of this court it would have been error to permit the amendment. Meinhausen v. Brewing Co., 133 Wis. 95, 113 N. W. 408, 13 L. R. A. (N. S.) 250; O'Conner v. Railway Co., 92 Wis. 612, 66 N. W. 795. If this were not so, it would have been an abuse of discretion to deny the amendment. Miller v. Kenosha Electric Co., 135 Wis. 68, 115 N. W. 355, and cases cited. Section 2830, St. 1898, permits an amendment only where it does not "change substantially the claim" of a party. As I understand the record, the trial court did not hold that it was without power to grant the amendment. It held that its jurisdiction should not be exercised under the facts before it.

EMERY v. PEASE.

Court of Appeals of New York, 1859. 20 N. Y. 62.

Appeal from the Supreme Court. The complaint set out an agreement between the plaintiff and defendant, by which the former was acting as a superintendent of a manufactory of agricultural implements, and was to receive, in addition to a fixed salary, half the net profits of the business. It was provided

that the net profits were to be ascertained by deducting from the gross receipts various enumerated charges and expenses, and all losses in the business, including bad debts. The plaintiff was to keep the books, and at the end of each year an accurate account was to be taken of the stock and business of the factory, the net profits ascertained and the plaintiff's compensation to be paid in cash or the defendant's notes at six months. The plaintiff averred that he served as superintendent one year, and at the end thereof, with the knowledge and assent of the defendant, he made out an accurate account and inventory of the stock and business, and stated an account of the net profits of the business according to the stipulations of the agreement, and delivered the said statement in writing to the defendant, February 19, 1855, to which he made no objections, and now (the complaint was verified March 30, 1855) has the same in his possession. Breach, that defendant refused to pay half the net profits stated in said account, which, after deducting a credit admitted by the complaint, amounted to $6,544.62, for which sum, with interest, judgment was demanded.

The answer averred that the entire balance claimed by the plaintiff consisted in uncollected demands for goods sold during the progress of the business upon terms of credit, which in most instances had not expired, and insisted that the defendant was not liable to pay any sum for net profits until the demands outstanding were collected, and the losses to happen from bad debts deducted therefrom.

On the trial at the Albany Circuit before Mr. Justice Gould, the defendant moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The judge granted the motion, holding that the plaintiff should have brought his action for an accounting. The plaintiff excepted, and the judgment against him having been affirmed at general term in the third district, appealed to this court.

Comstock, J. Regarding the suit as an action at law according to the distinction between legal and equitable remedies which formerly prevailed, we think the Supreme Court were right in holding that it could not be maintained upon the facts averred in the complaint. The pleader has set forth some matters of evidence having perhaps a slight tendency to prove that the account had been taken and the balance due to the plaintiff ascertained by the parties according to the principles of the

agreement between them. But he seems carefully to have avoided the very conclusion of fact which alone would justify a suit for the recovery of an ascertained and admitted balance, to-wit, that the parties had stated the account and that the statement thus made showed there was due to the plaintiff the sum which he claimed to recover. The averment that the plaintiff had made a statement and delivered it to the defendant, who made no objections to it, does not necessarily establish the required conclusion even if it has a tendency in that direction; and consequently we cannot hold that the fact of an account stated between these parties has been pleaded in any manner or form. We are required, and we are always inclined to give a liberal and benign construction to pleadings, under the present system; but if a party either ignorantly or wilfully will omit the very fact on which his case depends, and will content himself with averring evidence inconclusive in its nature, he must take the consequences of his error if objection be made at the proper time.

But if an account of net profits has not been taken according to the rule furnished by the agreement, it seems to us, upon the facts stated, that the plaintiff is entitled to such an account[6] and then to recover whatever sum, if anything, shall appear to be due him. This is probably not the view in which the suit was brought, nor is it in accordance with the prayer of the complaint. But relief is to be given consistent with the facts stated, although it be not the relief specifically demanded (Code, § 275); and in determining whether an action will lie, the courts are to have no regard to the old distinction between legal and equitable remedies. Those distinctions are expressly abolished (Code, § 69). A suit does not, as formerly, fail because the plaintiff has made a mistake as to the form of the remedy. If the case which he states entitles him to any remedy, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment to which he is not entitled. In this case the plaintiff was to be paid one-half of the net profits of a certain business, to be ascertained by an annual accounting in a

6 It seems questionable whether this complaint was any better on the theory of an accounting than it was on the theory of an account stated; See Mulholland v. Rapp, 50 Mo. 52 (1872), where a very similar complaint framed for an accounting, was held insufficient for that purpose.

particular manner. His averments are too feeble to show that any precise sum or any sum at all is due to him; but we think they do show that he is entitled to an accounting in order to ascertain whether anything and how much is due. That being ascertained by appropriate proceedings in the action, final judgment will be given accordingly.

The judgment must therefore be reversed and a new trial granted.

BARLOW v. SCOTT.

Court of Appeals of New York, 1861. 24 N. Y. 40.

Appeal from the Supreme Court. The complaint set forth a contract for the conveyance by the defendant to the plaintiff of forty acres of land by a good warranty deed. It averred that the defendant had tendered a deed which contained only a covenant of warranty against his own acts, which the plaintiff refused to receive; that the defendant had no title to the land, but that it was in the possession of a third person, who held it adversely under a valid title. It prayed for a specific performance of the contract, or for damages. The defendant denied the contract to convey with general covenant of warranty. The trial was before a judge without a jury. The case did not show whether this was by consent, nor that any objection was taken to that mode of trial. The judge found the facts, and the same are sufficiently stated in the following opinion, and ordered judgment for the plaintiff for $500 damages. The judgment having been reversed, and a new trial granted at general term in the sixth district, the plaintiff appealed to this court.

LOTT, J. * * * These considerations lead us to the conclusion that the defendant was bound to grant and convey the premises in question to the plaintiff in fee by a good warranty deed.

This conclusion is in accordance with right and justice, and is sustained in principle by authority. (Story on Contracts, §§ 13 and 13a; Wiswall v. Hall, 3 Paige, 318; De Peyster v. Hasbrook, 1 Kern. 583, 590; Alexander v. Vane, 1 Mees. & Wels. 511.) The defendant has failed and refused to comply with

that obligation. Not only is the deed tendered insufficient in form, but it also is found that at the time it was tendered the premises were in the possession of another party; and that the same were then, and since have been, held and occupied by such party under deed thereof, and claiming title thereto adversely to the title of the defendant and those under whom he claims. His deed, therefore, would be void as against the party claiming adversely, and would not confer the right of possession or any title under which possession could be recovered; and the court properly refused to give judgment directing a conveyance.

It is, therefore, a case where the plaintiff is entitled to damages for the non-performance of the agreement, and the remaining question to be considered is whether they are recoverable in this action. The complaint is framed for the specific performance of the agreement, and in default thereof for compensation in damages. It, after setting forth the terms of the contract sought to be enforced alleges that the plaintiff has no valid title or interest in the land in question, and that the same is in the possession of another party, holding the same under a good and valid title. It was therefore, a case where the facts alleged were not sufficient to justify a decree for specific performance, and it may be conceded, as stated in the opinion of the court below, to have been a well settled rule under our former judicial system, that a court of equity where such relief only is obtainable, would not have retained the suit for the purpose of awarding a compensation in damages, for the non-performance of the contract to convey; for the reason that actions for damages only were properly cognizable in courts of law, in which a perfect remedy could be had. Under our present arrangement the same court has both legal and equitable jurisdiction, and if the facts stated by a party in his complaint are sufficient to entitle him to any of the relief asked, and an answer is put in putting these facts in issue, it would be erroneous to dismiss the complaint on the trial merely because improper relief if primarily demanded. It is competent for the court, under such circumstances, to grant any relief consistent with the case made by the complaint and embraced within the issue (section 275 of the code) and the statement of the right of the plaintiff and its infringement by defendant constitute such case as stated by Johnson, J., in Marquat v. Marquat (2 Kern 333, 341); Phillips v. Gorham, (17 N. Y. 270); Truscott v. King, (2 Seld. 165);

Wiswall v. Hall, (3 Paige 314); LeRoy v. Platt, (4 id. 77); The New York Insurance Company v. North Western Gas Company, (21 How. Pr. 296, 298). These are the only questions properly presented on the appeal.

It is, however, insisted by the defendant, that it was erroneous for the court to order judgment for the plaintiff on a trial of an issue without a jury. There is nothing in the case to show that the action was so tried against or without the defendant's consent.[7] The objection does not appear to have been made at the trial, and if it was, the fact should have been stated in the case, and not appearing there it cannot be urged in this court as a ground for reversing the judgment. (Greason v. Kreteltas, 17 N. Y. 491.)

The result of these views is that the judgment of the general term should be reversed and that of the special term affirmed with costs, in the supreme court, but without costs to either party on this appeal.

Judgment at general term reversed, and that at special term affirmed.[8]

[7] "A party may waive his right to the trial of the issue of fact, by a jury, in any of the following modes:

1. By failing to appear at the trial.

2. By filing with the clerk a written waiver, signed by the attorney for the party.

3. By an oral consent in open court, entered in the minutes.

4. By moving the trial of the action, without a jury; or, if the adverse party so moves it, by failing to claim a trial by a jury, before the production of any evidence upon the trial." N. Y. Code, Civ. Proc. § 1009.

[8] And so in White v. Lyons, 42 Cal. 279 (1871), where a complaint framed for an accounting and other equitable relief, and insufficient for that purpose, was sustained as stating a case at law.

But see Denner v. Ry., 57 Wis. 218 (1883), where the court refused to sustain an insufficient complaint for an injunction as an action at law for damages. At this period and somewhat later the Supreme Court of Wisconsin took a strict view of pleading, Supervisors v. Decker, 30 Wis. 624.

NEW YORK ICE CO. v. NORTHWESTERN INSURANCE CO.

Court of Appeals of New York, 1861. 23 N. Y. 357.

COMSTOCK, CH. J. The object of the suit was to recover the sum of $4,000, in which the defendant, by a fire policy, insured the plaintiffs. In the complaint it was stated that a certain clause in the policy descriptive of the subject of insurance was inserted by mistake, and that the defendants, taking advantage of that clause, had refused to pay the loss. The prayer of the complaint was for the recovery of the $4,000; and, if necessary, that the contract be reformed by striking out the clause in question. The case was tried before Mr. Justice Ingraham, who dismissed the complaint. The decision proceeded solely on the ground that the plaintiffs had not made out a right to have the contract reformed; but no determination was made that the plaintiffs were not entitled to recover on the policy as it actually was. The learned Justice was of the opinion that such a recovery could not be had without instituting a new suit, and the judgment was accordingly without prejudice to the right of bringing another action. But the plaintiffs afterwards ascertained that, by a provision in the policy, actions must be brought within twelve months after a loss, and that it was too late to begin *de novo*. They then moved the special term to amend the order of dismissal, by inserting leave to file a complaint "at law"[9] in the same action, and an order granting such leave was made. From this order the defendants appealed to the general term, where the same was reversed, and from the order of reversal the plaintiffs appealed to this court. The defendants move to dismiss this appeal.

I confess myself unable to see why the plaintiffs were not entitled to a reformation of the contract. The learned justice who tried the case, in the opinion given by him, after referring to the evidence, observes: "The only conclusion I can adopt on this evidence is that there was a mutual mistake as to the description of the premises arising from a misunderstanding of the parties in the original negotiation of the contract, and

[9] See Friedrichsen v. Renard, 247 U. S. 207 (1917), where such an amendment was allowed to avoid the statute of limitations.

that the defendants' agent in making the policy made it as he intended it should be when he agreed to insure the property. The policy was made according to his description entered by him in the books of the company," etc. Now, if the misdescription of the subject of insurance was material, and was entered in the books of the company, and found its way into the policy in consequence of a mutual mistake or misunderstanding of the parties, it seems to me that a proper case was made out for a reformation of the contract.

In the next place, I am of opinion that it was erroneous to turn the plaintiff out of court on the mere ground that he had not entitled himself to the equitable relief demanded, if there was enough left of his case to entitle him to recover the sum in which he was insured.[10] No suggestion was made that the complaint did not show a good cause of action for this money, even after striking out all the allegations and the prayer on the subject of equitable relief. But because it contained those allegations, and because those were tried without a jury and tried unsuccessfully, the court refused to entertain the case for the relief to which the plaintiff was in fact entitled, that is to say, for the recovery of the money without reforming the contract. This ruling proceeded wholly on the authority of the case of Reubens v. Joel in this court (3 Kern. 488), which, it is intimated, was a departure from previous cases also in this court. But this is a mistake. In that case a debtor had made, as it was alleged, a fraudulent assignment of his property; and a creditor, by simple contract, commenced a suit against the assignor and assignee praying a recovery of his debt, and for an injunction to restrain the alienation of the property assigned. The question in the case arose on demurrer, put in by the assignee, and the point determined in this court was, that such a creditor was not entitled in such a case to equitable relief by injunction. We all thought that the creditor had no standing in court, legal or equitable, as against the assignee, until after judgment against his debtor, and whatever was said beyond this is to be taken as individual opinion merely. The doctrine of the previous cases (2 Kern. 266; id. 336), favorable to uniting in the same

10 As to whether such a complaint should be regarded as stating two causes of action, see Imp. Shale Brick Co. v. Jewett, 169 N. Y. 143, (1901), ante p. 35; Kabrich v. State Ins. Co., 48 Mo. App. 393, ante p. 31.

action legal and equitable grounds of relief,[1] was not intended to be disturbed; and a case in this court of a later date has reaffirmed that doctrine in the most explicit manner. (Phillips v. Gorman, 17 N. Y. 270.) In this case the point was very distinctly presented, and it was decided upon the fullest consideration. I think it proper to mention that the reason why I expressed no opinion in the case was, that I hesitated in regard to the power of the legislature under the Constitution to abrogate all the distinctions between legal and equitable actions. That such was the expressed intention of the legislature in the Code of Procedure, I never had any doubt. Both of these questions must now be considered at rest.

And in the next place, I do not see the grounds upon which the court below, in general term, reversed the order of the special term, giving to the plaintiff the right to put in a new or amended complaint in the action. I think the complaint was perfectly good, and that no amendment or substitution was necessary. It was much more clearly good in the so-called legal than in the so-called equitable aspect of the case. Nevertheless, the court corrected the judgment by adding the words, "or the

[1] Compare Bartlett, J., in Loeb v. Supreme Lodge, 198 N. Y. 180, (1909): * * * "After the defendant rested its case, counsel moved to dismiss the complaint upon the ground briefly stated that the course of the trial disclosed that the action should have been tried on the law side of the court. The trial judge reserved his decision on this motion. In an opinion submitted later the trial judge stated, among other things, as follows: "The cause was placed upon the equity calender, and upon the trial the defendant made the point that the plaintiffs had failed to establish by proof any ground for equitable relief and that, having abandoned that part of the complaint, they should be remitted to their action at law. The plaintiffs did not acquiesce in this position and ask to be sent to the law side of the court for trial, but insisted upon their right to judgment after trial on the equity side before the court without a jury. Under these circumstances it seems to me plain that the plaintiffs, having failed to establish a cause in equity should suffer a dismissal for their complaint."

"In so holding the trial judge was clearly right under authority of Bradley v. Aldrich (40 N. Y. 504). * * * It would seem that no other course was left to the trial judge but to dismiss the complaint. If the plaintiffs saw fit to stand on their original position, that the action on this benefit certificate presented issues that were triable in equity, they were entitled to test the soundness of that proposition on appeal." * * *

plaintiff may serve a new complaint at law in this action on payment," etc. * * * The amendment simply gave leave, in the plaintiff's election, to go on in the same action after reforming his complaint. In all this I see nothing but practice and discretion which afforded no ground for review.

But the inquiry remains whether the order of reversal, pronounced at the general term, can be reviewed in this court. We regret to find that there is no provision of law which authorizes such an appeal. The order appealed from does not, we think, "in effect determine the action and prevent a judgment from which an appeal might be taken." (Code, § 11, sub. 2.) On the contrary, it leaves in force a judgment in the action rendered upon the trial, from which an appeal might be taken, and, so far as we know, may still be taken. The case, therefore, does not seem to be embraced in any of the subdivisions of the 11th section of the Code, which is the only authority for appeals to this court. The appeal must, therefore, be dismissed, but without costs.

Appeal dismissed.

RUSH v. BROWN.

Supreme Court of Missouri, 1890. 101 Mo. 586.

This is an appeal from the decision of the circuit court of Buchannon county, sustaining defendant's demurrer to plaintiff's amended petition for specific performance of an agreement to convey the real property of the respondent, Mary L. Brown, a married woman, held as her legal (not statutory or separate) estate. Defendants are husband and wife.

The material facts on which relief is asked in the petition are these: That before the 25th day of February, A. D. 1887, the defendants, and each of them jointly and in the presence of each other, made, constituted and appointed, and by their declaration, by parol, lawfully authorized one Owen, as their agent, to sell for them the parcel of land in controversy, upon certain terms, for the price of twelve thousand dollars; that on the 25th of February, 1887, and while such agency was still in full force, said Owen, in the name of, and as such agent for, said defend-

ants, sold said real estate to plaintiffs, upon the terms aforesaid, and plaintiff paid defendant's said agent the sum of three thousand dollars, and otherwise complied with the terms of sale; that at the time of the payment of said three thousand dollars, the said Owen, as the agent of said defendants, delivered to plaintiff a certain memorandum in writing, whereby the defendants acknowledged the receipt of said sum of three thousand dollars, and declared that the same constituted the cash payment of the purchase price of the said real estate that day sold plaintiff, etc., to which memorandum the names of the defendants were signed by said Owen, as aforesaid, their agent (which memorandum was filed); that, after such payment of three thousand dollars, the defendants, and each of them, after being informed of the payment thereof, and the making and the signing of said memorandum, each, and jointly by parol, ratified and affirmed the same, yet the defendants, and each of them, ever since have and now refuse to convey the same to plaintiff by deed in proper form.

"Wherefore the plaintiff prays that defendants be ordered by this court to make, execute and deliver to plaintiff their deed in common form with usual covenants of warranty conveying to plaintiff the real estate aforesaid, as by their said note and memorandum herewith filed, they are bound to do, and that plaintiff further recover his costs in this cause laid out and expended, and for all and such other relief as should be granted in the premises."

BARCLAY, J. Under our statutes and the uniform construction of them that has for many years prevailed, a married woman cannot be compelled to specifically perform a contract for the sale of her legal estate in land. R. S. 1889, sects. 2396 and 2397; Shroyer v. Nickell, 55 Mo. 264.

So well established is this rule, that we are disposed to stop with the briefest announcement of it rather than to hazard obscuring it by elaboration.

The prayer of the petition here is for specific performance and general relief. A general demurrer to the petition having been sustained and the case brought here in that shape, the question arises, can plaintiff obtain a reversal because the trial court did not enter judgment against one of the defendants (the husband) for the amount of the purchase money paid as alleged? No prayer for such a recovery is contained in the

petition. That is evidently framed with a view to such relief as formerly could have been given only by a court of chancery as distinguished from a court of law.

But it seems to be imagined that any kind of judgment (whether legal or equitable in nature), that any particular facts alleged may warrant, should be given, under our code of procedure, in such a case, whether asked or not. We do not assent to that view.

One of the purposes of the code is to substitute specific and concise statements of the actual facts of each controversy for the more general declarations of demands formerly in use in courts of law, and the unnecessary prolix and elaborate pleadings in chancery. The object in view is to have the defendant fully advised in each case of the precise complaint he is called upon to meet.

In harmony with this object, it is provided that the petition shall contain (among other things) "a demand for the relief to which the plaintiff may suppose himself entitled," and that, "if the recovery of money be demanded, the amount thereof shall be stated, or such facts as will enable the defendant and the court to ascertain the amount demanded." R. S. 1889, sec. 2039.

It is obvious that, upon many states of facts presented to a court for action, divers remedies may be applicable, some strictly legal, others, perhaps, equitable in nature. It would be a departure from the true spirit and meaning of the code to require of plaintiff "a plain and concise statement of the facts constituting his cause of action" without requiring (at some stage of the case) a plain statement of the judicial action demanded thereon, for the information of the defendant and of the court.

This is especially true where, as in Missouri, by the terms of the constitution (Const. 1875, art. 2, sec. 28), the right of trial by jury is preserved inviolable in ordinary cases "for the recovery of money only, or of specific real or personal property" (Revised Statutes, 1889, sec. 2131), usually termed actions at law, whereas suits formerly cognizable in chancery may be properly tried without a jury.

With us it is, therefore, often of importance to all concerned to know what relief plaintiff demands, in order to determine the proper constitutional mode of trial. On this account, it is sometimes necessary, in the practical administration of justice,

to recur to the inherent distinctions between legal and equitable rights and remedies, and to insist that parties asking aid of the court state the nature of the relief desired, as well as the facts on which they demand it.

It is the duty of all courts to so construe the code as "to secure parties from being misled." R. S. 1889, sec. 2117. But it is obvious that parties would often be misled as to the real nature and issues of the case if an ordinary judgment at law might be rendered by the court on a petition praying only equitable relief, without other notice of such legal demand than the supposed case in equity *incidentally* disclosed.

The code, no doubt, intended to abolish many distinctions with respect to forms of statement, between actions at law and suits in equity, and to empower the same court (if necessary in the same proceeding) to adjudicate legal and equitable rights and apply thereto legal and equitable remedies, but it does not sanction, and should not be so interpreted as to encourage such vagueness and uncertainty in the petition as would leave the adverse party and the court in doubt as to the relief demanded, and hence as to the mode of the trial, and as to the issues which would be material and decisive in it. Humphreys v. Milling Co. (1889), 98 Mo. 542.

Moreover, we review in this court only such objections to proceedings as have been expressly decided by the trial court. R. S. 1889, sec. 2302.

Parties who wish to change or enlarge their demand for relief should do so by amendment or otherwise while the cause is before the trial court, at least in those instances where the case goes off upon demurrer, for the general provision permitting the court to grant "any relief consistent with the case made by the plaintiff and embraced within the issues," (R. S. 1889, sec. 2216) can have no proper application where final judgment for defendant has been reached on demurrer. In that event the prayer for general relief, supplemental to one for specific performance, cannot, in view of section 2039 (R. S. 1889), be construed as a prayer for a money judgment.

The judgment of the trial court was correct and is affirmed, with the concurrence of all the members of the court.

CADDELL v. ALLEN.

Supreme Court of North Carolina, 1888. 99 N. C. 542.

In the course of the trial of this action, the plaintiff, the defendant objecting, was allowed to put in evidence a paper writing purporting to be a power of attorney from Stephen Lacey and Thomas Lacey to David Cuthbertson, empowering the latter to sell and convey the title to the lands therein mentioned and described. This paper writing concluded as follows: "In witness whereof, we, the said Stephen and Thomas Lacey, have hereunto set our hands and seals, October 26th day, 1816." (Signed) Stephen Lacey, Thomas Lacey. But no seal, nor any mark or scroll purporting to be a seal, is affixed to or set opposite these signatures, or elsewhere in the writing. The plaintiff, likewise the defendant objecting, was allowed to put in evidence a deed from David Cuthbertson, attorney, which purported to convey the title to the lands therein mentioned and described, of Stephen Lacey, one of the parties signing and making the power of attorney, to Aaron Stegall. The following is a copy of so much of this deed as need be set forth here: "This indenture, made this 23d of Feb., 1828, between D. Cuthbertson, of the State of North Carolina, and County of Anson, attorney for Stephen Lacey, of the one part, and Aaron Stegall of the state and county aforesaid, of the other part, witnesseth, that, for and in consideration of one hundred and fifty dollars to him in hand paid by the said Stegall, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, four certain tracts of land lying," etc. (describing them), "and the said D. Cuthbertson, in the name and by virtue of his power of attorney from the said Stephen Lacey, warrants and forever defends the said tracts, containing six hundred acres of land, and premises, free and clear of all manner of incumbrances, to the said Stegall, his heirs and assigns, forever, in as full and ample a manner as the most learned in the law can devise. In witness whereof, the said D. Cuthbertson, attorney as aforesaid, doth hereunto assign this instrument, and seal the same. (Signed) D. Cuthbertson, Attorney for Stephen Lacey. (Seal.)" The defendant, among other things, requested the court to charge as follows: (1) That the power of attorney from Stephen and Thomas Lacey to D. Cuthbertson is void for

uncertainty in the description of the land which the said D. Cuthbertson is authorized to sell and convey; that the said power does not authorize the said Cuthbertson to convey the land said to be embraced in the Lacey grant. (2) That the deed from D. Cuthbertson, the alleged attorney and agent of the said Stephen and Thomas Lacey, passes no title to the land therein attempted to be conveyed; the conveyance being in the name of Cuthbertson, and not in that of the said Lacey. * * * There was a verdict and judgment for the plaintiff, and the defendant appealed to this court.

MERRIMON, J. It is the settled law of this state, that an agent or attorney in fact cannot execute a deed of conveyance of land, binding upon his principal, unless he be authorized thereunto by a power of attorney under seal. The ancient rule of law in this respect has not been modified or trenched upon by this court, and we are not at liberty or inclined to so do now. If the hurry and convenience of business transactions in the present state of society require easier and less solemn methods of conveyance of land than formerly, it is the province of the legislature, and not that of courts, to modify and change settled rules of law to that end. * * *

But, if the power of attorney were sufficient, the deed in question was not executed in pursuance and in the proper exercise of the power. It everywhere, in the body of it, purported in terms to be that of "D. Cuthbertson, * * * attorney of Stephen Lacey," etc. He, not his principal, purported to convey title; and, as a consequence, no title passed, for he had none to convey. The deed should, by its effective terms of conveyance, be and purport to be that of principal, executed by his attorney, and to convey the estate of the principal. It is not sufficient that the attorney intended to convey his principal's estate; he must have done so by apt words, however informally expressed to effectuate that purpose. The distinct purpose of the principal to convey, and the necessary form and operative words to convey his estate, must appear in the body of the deed in all essential connections. His name should be signed, and purport to be signed, and his seal affixed by the attorney; but the signing will be sufficient, if it be by the attorney for the principal. * * * So that the power of attorney and the deed were both insufficient; and the court should have rejected them when objected to in the course of the trial, and, failing in this,

it should have given the special instructions asked for in such respect to the jury.

It was suggested that the court could see, upon the face of them, the purpose of the power of attorney and the deed to convey the title to the principal, and they should receive such interpretation as will effectuate the purpose. Courts will interpret pertinent words and phraseology in deeds and like instruments in such way as to effectuate the intention of the makers thereof, appearing from the whole instrument, when this can reasonably be done; but there must be proper, pertinent and necessary words and phraseology in them to interpret. The court cannot supply and interpolate these. That would be to make them; and this is not the province of the court, but only that of the parties to them. The court can only construe what appears, however informally. It cannot supply the substance, or change or modify that appearing, although it may be satisfied that the parties to the instrument failed to make it what they intended. They are bound by what they have, in effect, under the rules of law, done, whatever may have been the intention.

It was further suggested, inasmuch as the court can, in the same action,[2] try, and hear, and determine both legal and equitable causes of action in appropriate cases, it, seeing the intention of the parties, as to the power of attorney and the deed before us, could and ought to require them to be reformed, and the plain mistake corrected. It may be that, in appropriate cases, this could and ought to be done. But here the action and the cause of action are simply at law. No equitable cause of action is alleged, nor is such relief demanded. When equitable rights are to be litigated and relief sought, there must be proper allegations and pleadings to such end, and all parties to be

[2] Under the Code legal and equitable causes of action may be joined in the same complaint in a proper case, though seperate trials are necessary.

Formerly courts of equity tried certain legal claims and awarded legal relief as an incident to the main case in equity, and this practice does not appear to be affected by the code, Imperial Brick Co. v. Jewett, ante p. 35.

But since the adoption of the code, it has sometimes been strenuously urged that the law courts ought to be able to administer equity, or, since one court administers both systems, equity ought to be administered and equitable relief attained in a legal action. The practical objection is that the jury trial, which obtains as a matter of right in a legal action, is not well suited to the task. Ed.

effected by the relief demanded must be made parties to the action. It may be that those interested adversely to the plaintiff will not consent to the making of the desired correction, and they are entitled to have their day in court, and to contest the claim of the plaintiff in the ordinary course of procedure. It is a mistaken notion, that to some extent prevails, that under the present method of civil procedure the courts can try, hear, and determine civil actions, and causes of action anyhow and in any way, however summary. It has character and integrity. It has purpose, principles, and forms, that are necessary in the safe and orderly administration of public justice, that must be observed, and the courts must uphold and enforce.

There is error. The defendants are entitled to a new trial, and we so adjudge. To that end, let this opinion be certified to the superior court. It is so ordered.

JACKSON v. STRONG.

Court of Appeals of New York, 1917. 222 N. Y. 149.

CUDDEBACK, J. The complaint in this action sets forth that the plaintiff and the defendant Strong, who are attorneys at law, entered into a contract to prosecute for their joint benefit a negligence case. One William Simons had been killed in an accident, caused, as it was said, by the carelessness of the International Railway Company.

The plaintiff and Strong agreed, as the complaint shows, to investigate the circumstances of Simons' death and ascertain if his personal representatives had a cause of action against the railway company and to bring suit against the company if it was ascertained that a cause of action existed. They were to bear equally the expenses of the litigation, become partners in the conduct of the case, and share equally in the receipts.

The complaint further sets forth that the suit was brought by Strong as attorney against the railway company and a verdict of $8,550 was rendered in favor of the personal representatives of the decedent, and that the judgment entered on the verdict was subsequently affirmed at the Appellate Division and in this court. Furthermore, that the defendant Strong re-

ceived from the railway company the amount of the judgment with interest and costs, and that he now repudiates the contract with the plaintiff and refuses, after due demands, to pay over to the plaintiff his share of the recovery.

The defendants Petrie, Fiederspiel and Thayer are joined as defendants because the plaintiff assigned to each of them a certain undivided part in his share of the judgment against the railway company under his agreement with the defendant Strong. It was subsequently stipulated that the plaintiff should collect and receive whatever sum these defendants might be entitled to.

The plaintiff in his complaint demanded judgment against the defendant Strong for an accounting to determine the amount due to the plaintiff and for the recovery thereof.

The answer of the defendant Strong is a general denial of the allegations of the complaint that the defendant agreed to share with the plaintiff any amount recovered from the railway company, and the answer alleges that the defendant Strong simply employed the plaintiff to assist in the prosecution of the action and agreed to pay him the reasonable value of his services. The other defendants, Petrie, Fiederspiel and Thayer, answered, setting up their assignments.

The action was referred to a referee to hear, try and determine the issues, and thereafter the trial before the referee proceeded. There was no application by either party for an amendment of the pleadings. The case was then submitted to the referee.

The referee rendered his report as in an action at law, finding in substance that the plaintiff, at the request of the defendant Strong, performed certain services in prosecuting the action against the railway company to recover damages for the death of Simons and that the defendant agreed to pay the plaintiff liberally out of the recovery in the event of success in the action, but nothing if the suit was not successful. The referee also found that the prosecution of the case was successful and that the defendant Strong recovered $4,328.25, and that the value of the plaintiff's services was $1,082, and his traveling expenses were $24.65.

As a conclusion of law the referee found that the plaintiff was entitled to judgment against the defendant Strong for $1,106.65,

with costs, and he ordered judgment accordingly. To these findings the defendant duly filed exceptions.

At the request of the defendant the referee found that there was no contract between Strong and the plaintiff whereby the latter acquired any specific interest in the recovery against the railway company, and also found in effect that Strong and the plaintiff were not partners.

We have then a case wherein the complaint sets forth a cause of action in equity which, as the finding was, the plaintiff failed to prove on the trial, and the court without any amendment of the pleadings awarded the plaintiff damages as in an action at law. Was that proper? I think not. There is some confusion in the cases bearing upon this subject, but the weight of authority is that where some ground of equitable jurisdiction is alleged in a complaint but fails of proof in its entire scope on the trial, and it appears that there never was any substantial cause for equitable interference, the court will not retain the action and grant purely legal relief, but will dismiss the complaint.[3] (Dudley v. Congregation, etc., of St. Francis, etc., 138 N. Y. 451; Arnold v. Angell, 62 N. Y. 508; Loeb v. Supreme Lodge Royal Arcanum, 198 N. Y. 180; Walrath v. Hanover Fire Ins. Co., 216 N. Y. 220; Freeman v. Miller, 157 App. Div. 715;

[3] Andrews, J., in Saperstein v. Mechanics & Farmers Sav. Bank, 228 N. Y. 257: * * * "The practice adopted was that where specific performance had become impossible at the time an action was begun and the plaintiff was aware of that fact the court on denying equitable relief would not retain the matter so as to award damages. The actions would be dismissed and the plaintiff left to his legal remedy * * *.

Under the Code practice in this state the rule has been altered to this extent. If a purely equitable action has been pleaded it still prevails. If, however, in addition to this equitable cause of action the facts as stated give rise to a legal liability then there should be no dismissal; the action remains to be tried. (Sternberger v. McGovern, 56 N. Y. 12; Margraf v. Muir, 57 N. Y. 155; Haffey v. Lynch, 143 N. Y. 241; Ohl & Co. v. Standard Steel Sections, Inc., 179 App. Div. 637). But it is now an action at law. Into such an action the plaintiff may not import equitable principles by demanding equitable relief to which he is not entitled. Being an action at law to recover damages for the breach of an executory contract it must be alleged and found either that the plaintiff himself has fully performed all those concurrent and dependent promises, which were the consideration for the contract, or that the performance has been waived by the defendant." * * *

Allerton v. Rhineland Machine Works Co., 165 App. Div. 557.) Such also is the general rule throughout the country. (19 L. R. A. [N. S.] note, p. 1064.)

The inherent and fundamental difference between actions at law and suits in equity cannot be ignored. As has often been said: "Pleadings and a distinct issue are essential to every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint would serve no useful purpose." And further: "The rule that judgment should be rendered in conformity with the allegations and proofs of the parties, '*secundum allegata et probata*,' is fundamental in the administration of justice. Any substantial departure from this rule is sure to produce surprise, confusion and injustice." (Lamphere v. Lang, 213 N. Y. 585, 588.)

I recommend that the judgment appealed from be reversed and a new trial granted, with costs to abide the event.[4]

Hiscock, Ch. J., Cardozo, McLaughlin and Andrews, JJ., concur; Crane, J., concurs in result; Pound, J., takes no part.

Judgment reversed.

MERRY REALTY CO. v. SHAMOKIN & HOLLIS R. E. CO.

Court of Appeals of New York, 1921. 230 N. Y. 316.

Crane, J.[5] * * * We, therefore, have the case presented to us as follows: The plaintiff has brought action to foreclose a mortgage, taken in exchange of property as part consideration. The defendant having previously brought action for rescission, counterclaims[6] by pleading the facts justifying rescis-

[4] Accord: Bradley v. Aldrich, 40 N. Y. 504, (1869), complaint for rescission on ground of fraud and proof of case for damages at law only; Maguire v. Tyler, 47 Mo. 115, (1870), complaint to charge defendant as constructive trustee, and proof of a legal right of possession; Anderson v. Chilson, 8 S. D. 64, (1895), complaint for an accounting on the basis of a fiduciary relation and proof of a legal debt. For a collection of the later cases see Johnson v. Bunn, 19 L. R. A. (N. S.) 1064, annotated.

[5] Statement and parts of opinion omitted.

[6] The counterclaim under the code is a cause of action set up by the defendant against the plaintiff: see Ch. v. Sec. 2, post.

sion and asking that the exchange be set aside, that the Hollis lots be restored to it together with $1,500 damages.

The trial proceeded upon this theory, no other claims were made for relief than those here stated, and the trial judge took the matter under advisement.

The judgment was not for rescission, but for $12,000 against the plaintiff for fraud and deceit. This represented the difference in the value of the equities between the properties exchanged. The court canceled the mortgage of $6,000 in part payment of these damages and gave judgment for the balance plus commissions paid, making $6,625. Was the court right in thus awarding money damages for fraud and deceit instead of rescinding the transaction and giving back the lots as prayed for?

There is no doubt but that a court of equity, where it appears that rescission has become impossible, may grant money damages in lieu thereof, but that is not this case, as there is no finding and no evidence to show that the exchange could not have been set aside and the respective properties restored to their original ownership together with damages to adjust the equities. (Valentine v. Richardt, 126 N. Y. 272, 277; Dudley v. Congregation, Third Order of St. Francis, 138 N. Y. 451.)

The remedies for fraud are stated to be (1) an action for deceit in tort; (2) in proper cases an informal rescission of the contract at law and a recovery of what has been parted with thereunder; (3) in proper cases a formal decree of rescission or cancellation in equity and a recovery of what has been parted with thereunder; (4) a defense against the enforcement of the executory promise induced by the fraud. The election of one of these remedies is a waiver of the others.[7] (Page on Contracts, p. 539, § 339; Gould v. Cayuga Co. Nat. Bank, 99 N. Y. 333, 337.)

If rescission is the remedy selected it must be in whole and not in part. If there be an affirmance it must be of all the terms and conditions of the transaction. (Hayward v. Wemple, 152 App. Div. 195, 198; McNaught v. Equitable Life Insurance Society of U. S., 136 App. Div. 774; Gatling v. Newell, 9 Ind. 571.)

The defendant had elected to rescind before this action was

[7] But see Friedrichsen v. Renard, 247 U. S. 569, (1918), allowing a bill in equity for rescission to be amended so as to convert it into an action at law for damages.

brought. After the amendment of the answer at the trial full and complete rescission was demanded. The judgment was not for rescission but for damages as in an action at law. The relief granted was inconsistent with the pleadings and the theory of the action. This, we think, was error.

In Bradley v. Aldrich (40 N. Y. 504, 509, 511) it was said:

"It is clear that this action, begun and tried as an action in equity, seeking upon various allegations equitable relief, and equitable relief only, viz., the rescission of an agreement and the restoration of the parties to their former condition, has ended as an action on the case for deceit, and an award of damages therefor; which is 'an action for the recovery of money only.' (Code, § 253.) * * *

"According to the record before us, he was not apprised of any such claim until its declaration, and its maintenance appeared in the decision of the judge; and to that he excepted, which alone he could do." * * *

Whatever hesitancy we have in coming to this conclusion by reason of the merits of the defendant's claim and of the evidence amply sustaining the findings of fraud and deceit is overcome by a desire to preserve to litigants the forms of procedure prescribed by law and the rights flowing therefrom. While it is true that substance is always more weighty than form, yet we must not forget that the preservation of our substantive law necessarily depends upon some uniformity in procedure. Rights and remedies are correlative and depend upon each other.

Upon a new trial the defendant may have full rescission and get its lots back, or if this is impossible owing to changed circumstances or is inequitable for any reason, *then* it may have full and complete damages awarded by the Special Term for fraud and deceit in lieu thereof and a cancellation of the mortgage as part liquidation of these damages.

For these reasons the judgment must be reversed and a new trial granted, costs to abide the event.

Hiscock, Ch. J., Hogan, Cardozo, Pound, McLaughlin and Andrews, JJ., concur.

Judgment reversed.

SECTION 3. SPECIAL PROCEEDINGS.[1]

LUCAS v. LUCAS.

Supreme Judicial Court of Massachusetts, 1854. 69 Mass. 136.

SHAW, C. J. At a former term of the court, the petitioner in the present case libelled his wife to obtain a divorce *a vinculo* for the cause of adultery, and upon a trial, judgment was rendered that the libel be dismissed. This, from the nature of the subject matter, must be deemed a final judgment against the libellant. Afterwards, this petition for a review was filed by the husband in order to have a new trial. At the hearing at *nisi prius,* the judge before whom it was brought was of opinion upon the evidence that there was sufficient ground shown for granting a review, if the court had authority to grant it; and this is the question reserved.

It is insisted on the part of the petitioner, that this court has authority to grant reviews in all civil actions, and that a libel for a divorce *a vinculo* is a civil action, because it is a judicial proceeding, in which one person seeks against another the redress of a private wrong or injury. The question depends on Rev. Stats. c. 99, §§ 1, 19.

It would hardly be safe to decide a question of this magnitude upon a mere brief definition, without regard to the subject matter, the obvious objects and purposes of the law, and the antecedent legislation on the subject. And it would seem to be peculiarly the duty of the court to hesitate long before putting such construction upon a statute which has been long in force, and where there is no precedent for applying the law and practice of reviews in the case of divorce. For, though the revised statutes now in force were passed comparatively a few years since, they were re-enactments of laws which had been in force nearly half a century. Sts. 1788, c. 11; 1791, c. 17.

It may be, that the term "civil action" in some respects, and to some purposes, may, without violence to the language, be held to include proceedings for divorce; and yet all laws respecting civil actions may not so apply as to include these proceedings. This results necessarily from the uncertainty and

[1] For statutory definition, see ante p. 1.

ambiguity of language. The fact that there has been no practice of allowing the review of decrees of divorce, and that this is a novel, if not an unprecedented, proceeding, is strong evidence of what the general understanding of the law on this subject has been; but this, of course, is not conclusive.

It will be recollected that at the time of the adoption of the constitution, and for several years after, proceedings for divorce were not within the jurisdiction of courts of law, but of the governor and council, who proceeded according to the forms and principles of ecclesiastical courts; and even when this jurisdiction was transferred by Stat. 1785, c. 69, § 7, it was given exclusively to the supreme judicial court, acting as an ecclesiastical court, and it was declared that the decree of the same court should be final.

Mr. Dane, who speaks of review in civil actions as depending on Massachusetts statutes, speaks of it as limited to a case where there has been a verdict, and to a suit commenced by a writ, and not by petition or complaint. 6 Dane Abr. 453, 454. It was held in several early cases in Massachusetts that, to warrant granting a review, the action must have been commenced by writ, and the judgment rendered on a verdict. Borden v. Bowen, 7 Mass. 93; Stone v. Davis, 14 Mass. 360. Perhaps that would now be holding the matter rather too strictly; Sturdivant v. Greeley, 4 Greenl. 538; but it indicates the prevailing conviction among lawyers and judges in regard to these laws, after they had been in operation many years. Looking then beyond the mere philological sense of the term, "civil action," as used in this clause of the revised statutes, we find that a process for divorce is in a certain sense a judicial proceeding; but that originally this jurisdiction was not vested in the courts of common law; that the trials and proceedings were not according to the course of the common law; that, though in a certain sense the object of a libellant is to obtain redress for a grievance or private injury, yet that is not by way of recovery or damages or obtaining property, real or personal, but rather for the purpose of ascertaining and declaring authoritatively the status and social conditions of a party, upon which numerous and most important social and personal rights and duties are made by law dependent. It is of the highest importance, not only to the security of parties but to the peace of society, that the relation of every party, either as married or otherwise, be at

all times distinctly understood. In ordinary cases of review of civil actions, the object is not merely to reverse or affirm a former judgment; but the original judgment may be altered or modified, enlarged or reduced, and the party reviewing may have judgment to recover back, in whole or in part, as the various circumstances of different cases may require. But if a review were to lie on a final decree of divorce, it could only be to reverse or affirm the former judgment. The court, in the judgment on review, would in effect render such judgment as the court should have rendered in the former case; so that the new decision would in effect relate back to the former, and determine the relations and the consequent rights and duties of parties, as from that time.

The alarming and dangerous consequences of the reversal of a former decree may be more striking in a case where such former decree granted a divorce, than in one where it denied such divorce. After the divorce *a vinculo*, should the one not the guilty party marry, it would be lawful and innocent. A reversal of the decree would show that the first marriage was never dissolved, and the party marrying would be liable to the severe penalty of the law against polygamy. Should personal property accrue to the wife, in the meantime, it might be trespass or even larceny for the husband to take possession of it; and yet a reversal of the decree of divorce would show that he had a good title and perfect right to take it. Not only might parties be exposed to punishment as for crimes, but the rights of husband, of wife, of children, to support and maintenance, and the rights of third parties towards them, would all be left in doubt, and this sometimes for years, whilst the petition and the review are pending. See Greene v. Greene, 2 Gray 363.

If such a decree of reversal cannot be rendered on review, when the decree sought to be reversed is a decree granting a divorce, it appears to us, though the consequences might not be so numerous and disastrous, yet, upon principles of law and justice, the result must be the same when the review seeks to reverse a judgment refusing a divorce. Such a decree is a judicial determination, as between the parties, of the whole matter of controversy contained in the libel, and settles conclusively that no divorce ought to be granted for the causes stated, either because not sufficient in law, or not true in fact. After such a decision the parties are plainly bound, by every

legal and moral obligation, to unite together in the performance of their conjugal duties to each other, and their parental obligations to their children, if they have any; all which would be impeded and delayed, if not ultimately defeated, by the pendency of a review.

For these reasons, or some of them, we think that it has never been adjudged that a writ of review[2] may be granted by this court, on a final decree of the court, either granting or refusing a decree of divorce; and if the legislature had intended to extend the authority of the court to such a case, they would have done it by express words. But the revised statutes did not apparently intend to make any alteration of the law in this respect, but simply to reinstate the law as it stood before. The court are therefore of opinion that, though in some respects, as in taxation of costs to a prevailing party, a prosecution for a divorce may have been regarded as a civil action, yet the provision of the revised statutes relied upon does not authorize this court to grant a review of a decree dismissing a libel for a divorce.

Petition dismissed.

HEYWOOD v. CITY OF BUFFALO.

Court of Appeals of New York, 1856. 14 N. Y. 534.

The defendants demurred to the complaint on the grounds that the court had not jurisdiction of the subject of the action; and that the complaint did not state facts sufficient to constitute a cause of action. The cause was heard at a general term of the superior court, and judgment rendered in favor of the defendants. The plaintiff appealed to this court.[3]

T. A. JOHNSON, J. This is an action in the nature of a suit in equity, brought in the superior court in the city of Buffalo, demanding judgment that a certain assessment made by the city

2 This does not mean, of course, that there can be no appellate review of divorce cases. In most of the states today there are statutes expressly providing for an appeal.

3 Statement condensed, and parts of the opinion and the concurring opinion omitted.

assessors under the authority of the common council of the city, with the approval of the mayor, upon the lands of the plaintiff, situated in school district number two, in said city, be declared null and void; and that the defendants be perpetually enjoined from proceeding to collect and enforce the said assessment against the plaintiff. The complaint alleges that the whole assessment was $7500 upon said school district, and was made for the purpose of defraying the contingent expenses thereof. The plaintiff is the owner of several lots in the district, and his proportion of this sum is assessed upon the lots. Various grounds of illegality in making the assessment are alleged in the complaint, which are all admitted by the demurrer.

The principal question in the case is, whether the plaintiff is entitled to this species of relief; and if that shall be determined against him, it will be unnecessary to examine the particular illegality specified. It was an appeal to the equity powers of the court in which the action was brought, and the relief sought was strictly of an equitable character. In order, therefore, to give the plaintiff the right to litigate this question on the equity side of the court, and the court power to administer that species of relief, it was necessary for him to state in his complaint facts constituting an equitable cause of action. He was bound to make out a case falling under some acknowledged head of equity jurisdiction. It is claimed that the assessment is a lien, and being unauthorized, it is a cloud upon the plaintiff's title, which equity alone has power to remove. It is also claimed that the court has the right to interpose its equitable powers to restrain the collection of a tax founded upon an illegal assessment.

It is true that such an assessment and tax is a lien upon real estate, and as such has preference over prior mortgages and judgments. The charter (Laws of 1853, 476, tit. 5, § 12) makes every unpaid tax and assessment a lien upon the land on which it is assessed or charged, for two years from the time when the roll containing it was delivered to the receivers. (Mayor of New York v. Colgate, 2 Kern. 140.) This, of course, means a legal assessment. But an assessment made by a board or body having no power to make it, is a nullity, and no lien upon any property. It is claimed, however, that such an assessment is an apparent lien, and should be removed as a cloud, for the reason that it is invalid. But the power of municipal and other inferior officers or bodies to make assessments is in the law, and is as ap-

parent as the act of assessment, and if the assessment is without authority it is not even an apparent lien. If, however, such an assessment is to be regarded as an apparent lien, it does not follow that it is a cloud within the cognizance of a court of equity. * * *

The general doctrine seems to be firmly established, that the correction of errors, in the proceedings and determinations of these inferior political jurisdictions is matter of legal and not equitable cognizance. And especially where, as in this case, it is a mere question of power, and there is no allegation of fraud or corruption in the body, or the officers by whom the assessment is authorized or made. The supreme court, as at present organized, has thus far steadily refused to lend its equitable powers for such purposes. (Livingston v. Hollenback, 4 Barb. 10; Thatcher v. Dusenbury, 9 How. Pr. 32; Bouton v. The City of Brooklyn, 15 Barb. 375.) The usual and undoubted remedy by certiorari,[4] is always open to every party conceiving himself aggrieved. That writ brings up the proceedings of the inferior body for review, and judgment passes directly upon their proceedings and determination thus reviewed.

It is claimed that the superior court, being possessed of both law and equity powers, had jurisdiction of the subject matter, and having jurisdiction, should have rendered judgment appropriate to the injury complained of and admitted by the demurrer. But its equitable powers only were invoked, and if the plaintiff failed to make out a case of equitable cognizance in his complaint, he was entitled to no judgment. Because the same court had power to set aside the assessment, had all the proceedings been removed into it by the appropriate writ from the inferior tribunal, it does not follow that a party may have the

[4] At common law the Court of King's Bench exercised a superintending control over inferior courts and administrative bodies by means of the writ of certiorari. It was chiefly used to remove the record from an inferior court to the King's Bench for the purpose of a trial, or for further proceedings in the latter court, or to remove the record for something in the nature of appellate review where a writ of error would not lie, or to remove the record and quash the proceeding where the inferior tribunal or body was acting without jurisdiction or in excess of its jurisdiction.

In the United States this peculiar jurisdiction of the Court of King's Bench has generally been conferred on courts of general jurisdiction and on certain appellate courts. Ed.

same relief in any other form of proceeding. There is a wide and radical distinction between bringing the record of the proceedings of an inferior body before a court for the purpose of having them reviewed and passed upon directly by such courts, and either reversed or affirmed, and bringing an original action, founded upon some alleged error in the proceedings of such body, and demanding judgment, not upon errors in the record, but upon the allegations of error in the complaint. Whatever distinctions may have been abolished by the Code of Procedure, this certainly has not. Indeed, it is still the law that a party who brings an equitable action must maintain it upon some equitable ground; and if his cause of action is of a legal and not an equitable nature, he must bring a legal action, or pursue a legal remedy. Where a matter is clearly or *prima facie* one of legal cognizance, a party must, in order to maintain an equitable action upon it, state clearly facts sufficient to entitle him to equitable relief, and to show that a perfect remedy cannot be obtained at law. * * *

Judgment affirmed.

BENOIST v. MURRIN.

Supreme Court of Missouri, 1871. 48 Mo. 48.

CURRIER, Judge, delivered the opinion of the court.

This was a proceeding under the statute (2 Wag. Stats. 1368, § 29), to contest the validity of a paper produced and proved in the St. Louis Probate Court as the last will and testament of the late Louis A. Benoist. After the case had been pending for some time in the St. Louis Circuit Court, and subsequently to the framing of issues, or rather the issue of *devisavit vel non*, the petition was dismissed without prejudice to the contestants' rights and upon their motion. The contestees thereupon moved to set aside the order of dismissal, and to reinstate the cause so that they might proceed to make proof of the will in solemn form, as it is called. The motion was overruled, and the contestees bring this case here by appeal. Whether the court was warranted in dismissing the petition in the manner stated, is the question presented by the record for consideration.

If this were an ordinary suit between litigating parties, over which the circuit court had original jurisdiction, there could be no doubt of the right of the plaintiffs to dismiss or take a non-suit at any time prior to the final submission of the cause to the court or jury. (Gen. Stat. 1865, p. 662, § 47;[5] 40 Mo. 178; 43 Mo. 321; Fink v. Bruihl, 47 Mo. 173.)

But this is not an ordinary suit, nor had the circuit court original jurisdiction of its subject matter. The original jurisdiction was with the Probate court, where the will was originally probated and ordered to record. The proceedings were *in rem*, operating directly upon the will—the *res;* and the transfer of the case to the circuit court did not change its character, or the character of its subject-matter. The effect of the contestants' petition and the proceedings under it was to transfer that subject matter from the Probate to the Circuit Court for adjudication in the latter court. There was no appeal in form, but the result of the process was the transference of the contest from an inferior to a superior court; and that may be done without a formal appeal, as was decided by this court in Dickey v. Malachi, 6 Mo. 182, and where it was also held that the jurisdiction of the circuit court in cases like the present is not original. The jurisdiction not being original, it must be derivative, in effect as upon an appeal.

If the statute had provided for a transfer of this class of cases from the inferior to the superior court by appeal, and the case had been brought up in that way instead of by petition, no one would claim that the proceedings could be dismissed at the instance of the contestants without prejudice to them—that is, without an affirmance of the prior judgment.

In St. John's Lodge v. Callender, 4 Ired. 342, the party proposing to establish the will moved for leave to take a non-suit, and the motion was overruled by the trial court, and its action was sustained by the supreme court of North Carolina. In delivering the opinion of the court, Ruffin, C. J., discusses the subject as follows: "We are not sure that we understand what was meant by the appellants asking leave to suffer a non-suit as the term is not appropriate to proceedings in the Probate Court.

[5] This section of the Missouri Code provides that: "The plaintiff shall be allowed to dismiss his suit, or take a non-suit, before the same is finally submitted to the jury, or to the court sitting as a jury, or to the court, and not afterwards."

But from analogy to actions at law, we suppose the object was to withdraw from the court before a verdict was rendered on the issue *devisavit vel non,* so as to prevent the delivery of a verdict, and leave the party at liberty to institute another proceeding of the same kind. If so, we think it inconsistent with a proceeding of this sort and contrary to the nature of the jurisdiction of the court of probate. The instrument propounded is always brought into court in the first instance, and the jurisdiction is *in rem.* The inquiry is whether the party deceased died testate or intestate; and if the former, whether the script propounded be his will or a part of it or not. When once regularly raised, the court must pronounce on these questions without reference to the presence of this or that person. If a case is about to be heard or under a hearing and a party in interest is not furnished with full proof and has been surprised, his course is, for cause shown, to get an order for opening the case to further proof and deferring the pronouncing of sentence. It is analogous to the trial of an issue out of chancery, only one is at the instance of the chancellor to satisfy his conscience, and the other the law compels the court of probate to make up in every case of a disputed will. From the nature of an issue, he who alleges the affirmative opens the case, and for that reason the party propounding the will is commonly spoken of as plaintiff. But it is inaccurate; for, properly speaking, there is neither plaintiff nor defendant, but both parties are equally actors in obedience to the order directing the issue. In neither case is the party in the affirmative at liberty to withdraw and defeat a trial more than the party in the negative."

In North Carolina it seems that the issue *devisavit vel non* is made up in the probate court and sent to the superior court for trial; while with us the same issue is framed upon the contestants' petition. But this can make no difference with the proceedings subsequent to the making up of an issue. In either case the proceedings is *in rem,* and strictly of probate jurisdiction.

In Missouri and in a number of other states there are two modes of proving a will, one provisional and the other final. The first is denominated the common form, the second the solemn form. A will is proved in the common form when it is presented, proved and ordered to record, as provided in the thir-

teenth section of our statute of wills. That is or may be done in the absence of the parties in interest, and without citing them to appear. The validity of the will may nevertheless be contested, and the proof of it in solemn form required. "When a will is proved in solemn form," says Nisbit, J., in Brown v. Anderson, 13 Ga. 176, "it is necessary that all parties interested be cited to witness the proceedings, that the will be produced in open court, that the witnesses be there examined, and that all parties in interest have the privilege of cross-examination;" and that, in substance, is what is contemplated in the twenty-ninth section of our statute of wills. The proof in solemn form in this state is required only when a contest arises, and then the case is transferred to the circuit court in the mode provided by law (§ 29) as was done in the case at bar. The question here is—all the requisite parties being before the court, and every preliminary step having been taken—whether it lies with th contestants to defeat the whole proceeding by a voluntary non-suit or dismissal.

In my view every consideration of public policy is against the allowance of such claim. It is opposed to the authorities and in conflict with the policy and nature of probate proceedings of this character. It has repeatedly been held that the propounders of a will—those in the affirmative—cannot take a non-suit, that it is the right of the contestants in such cases to insist on a verdict. (Roberts v. Trawk, 13 Ala. 86; St. John's Lodge v. Callender, supra; Whitefield v. Hurst, 9 Ired. 175; and see Burrows v. Ragland, 6 Humph. 484-5; Etheredge v. Idley, 1 Bradf. 95; 2 Redf. Wills, 28, § 2 and note.) If the contestants may insist on the proceedings going forward to verdict, certainly those on whom is the burden of establishing an instrument assailed and drawn in question by the action of the contestants, ought to have the same privilege.

I think the circuit court should have disposed of the case upon its merits, and not permitted the contestants to go out of court without prejudice. It was exercising a branch of probate[6] jurisdiction, and ought to have proceeded as it would have been the duty of the court of probate to have done had the statute

[6] For various probate proceedings which are not regarded as actions within the meaning of the Code, see Deer Lodge County v. Kohrs, 2 Mont. 66, (1874).

authorized the same proceedings in the latter court, and the contest had been there pending.

The judgment will be reversed and the cause remanded. The defendants motion will be sustained and the cause reinstated upon the docket of the circuit court. The other judges concur.

LACKLAND v. GARESCHE.

Supreme Court of Missouri, 1874. 56 Mo. 267.

ADAMS, Judge, delivered the opinion of the court.

This was an action by attachment, brought by the plaintiff against Thomas F. Smith, as a non-resident of this state, in which the defendant, Garesche was summoned as garnishee. No other property or effects of the defendant, Smith, were attached, except such as were alleged to be held by the garnishee, Garesche, as trustee for the use of Smith. The property held in trust by Garesche consisted of several houses and lots in the city of St. Louis. The only interests to which Smith was entitled was the right, under certain terms and conditions, to receive the net income, during his life, arising from the rents and profits after the payment of all expenses, such as taxes, insurance, repairs, etc. The nature and terms of the trust are manifested by a deed of conveyance, under which Garesche holds the title. According to a power in the original conveyance, Garesche had been substituted as the trustee in place of a prior trustee. For a full statement of the trusts of this conveyance, reference is made to the case of McIlvaine v. Smith et al. (42 Mo. 45), where it was held by this court, that Smith had no interest in the realty, subject to sale under execution.

One of the issues raised by the pleadings was that the conveyance under which Garesche held the trust property, was fraudulent and void as to the creditors of Smith; but this issue was entirely ignored at the trial. It was not referred to, nor was any attempt made at all, to attack the deed as being fraudulent as to creditors, and, therefore, we shall treat this case as though no such issue was in it. Under this view, it was simply an attempt to draw an exclusive equity jurisdiction into a court of law, by means of the statutory process of garnish-

ment in attachment suits. The court undertook to call a trustee of a pure express trust to account, and to enforce the performance of his duties as trustee in a trial of an issue at law, by a jury, or by the court sitting as a jury, and proceeded to examine into the state of his accounts, so far as to ascertain, as the record shows, that the trustee was accountable at least for a sum larger than the plaintiff's demand, which had been reduced to a special judgment, in the attachment suit, and then ordered the amount of that judgment to be paid to the plaintiff by the garnishee. And as the garnishee failed to comply with this order, the court declared him a debtor of the plaintiff and rendered a judgment against him, as upon a legal indebtedness due from him to defendant, Smith, and without any attempt to have a full and complete account taken and stated of the trust matters.

Although our code of practice has abolished all distinctions in the forms of actions for the enforcement or protection of private rights, and the redress or prevention of private wrongs, the line of demarkation between legal and equitable cases is still preserved and fully maintained by the code. The pleadings develop the nature of the case, whether legal or equitable, and as thus presented, the court proceeds to hear and determine it, either as a court of law or of equity, according to the pleadings. The remedy by attachment[7] for the collection of debts in this state is essentially legal, and not equitable, in its nature and procedure. It is founded alone upon statutory law, and, with few modifications, has been in existence as long as the state itself. It was in full force when the present code of practice was adopted, and it is safe to say that it has not been changed or essentially modified by that code. The whole tenor and scope of our attachment laws, so far as garnishees are concerned, indicate that they are intended to operate on legal property rights

7 Attachment and Garnishment are sometimes regarded as provisional remedies in an action, and sometimes as special proceedings. See Witter v. Lyon, 34 Wis. 564, (1874), distinguishing between provisional remedies in an action, and special proceedings.

See Hallahan v. Herbert, 57 N. Y. 409, (1874), that the statutory method of enforcing a mechanic's lien was not an ordinary action but a special proceeding to which the general provisions of the code as to parties was not applicable.

See also Milwaukee Traction Co. v. Elevator Co., 142 Wis. 424, (1910), proceeding to appropriate property under the eminent domain statute.

and effects of the debtor in the hands of the garnishee. The service of the garnishment operates as an attachment of such property in his hands. (I. Wagn. Stat. 184-5, §§ 18, 19, 23, and 664, §§ 1, 4, 7, 8.)

The issues on the answer of the garnishee are to be tried as ordinary issues between plaintiff and defendant. (I. Wagn. Stat., 666, 667, § 17.) If it appears upon the trial that the garnishee is possessed of property, effects or money of the defendant, the court or jury must find what property, etc., and the value thereof, and he may discharge himself by paying or delivering over the same to the proper officer under the order of the court, etc. (I. Wagn. Stat. 667, § 18.) These provisions demonstrate that the rights, credits, and effects in the hands of the garnishee, are such as are not encumbered with trusts, and such as may be delivered over or paid to the officer under the direction of the court, free from the embarrassment of the trust. It must be borne in mind that this was a continuing express trust, to last at least for the lifetime of the beneficiary, which has been drawn into a court of law, by way of garnishment, to compel the trustee to execute the trust in favor of a creditor of the beneficiary. In my judgment, it was not contemplated by the legislature to authorize a court of law, in a mere side issue growing out of an attachment suit, to exercise the intricate and complicated duties of a chancellor in the enforcement of purely equitable trusts. It is competent, under our statutes, to summon a fraudulent assignee of property and effects, and compel him to disgorge in favor of a creditor. For when such issue is found in favor of the creditor, no trust exists, and the property or effects can be delivered over without any trouble, to satisfy the debt. So if there has been a settlement between a trustee of an express trust and his beneficiary, and a balance found to be due upon such settlement, it becomes a debt at law, and may be garnisheed. But nothing of this kind appears in this case. We do not say that the plaintiff is without remedy. (Pendleton v. Perkins, 49 Mo. 565.) What we decide is, that if this trust was not fraudulent as to the creditors of Smith, the plaintiff has mistaken his remedy.

The judgment at general term (reversing the judgment of the trial court) is affirmed. The other judges concur.

CHINN v. TRUSTEES.

Supreme Court of Ohio, 1877. 32 Ohio St. 236.

Scott, J.: The plaintiff in error applied to the district court of Lawrence County, for a writ of mandamus, commanding the defendants in error to execute and deliver to him a township bond of said township of Fayette, for one hundred dollars in compliance with the requirements of Act of April 16, 1867, "to authorize and require the payment of bounties to veteran volunteers," and the acts amendatory thereof.

The facts stated in this relation were such as to bring his case, *prima facie* at least, within the purview of said statute, and to entitle him to such bond. He avers in his relation that since the year 1867, he has often requested the trustees of said township, and their successors in office, including the present board of trustees, to draw, perfect and deliver to him such bond, which they have refused and still refuse to do.

His application was made to the district court August 9, 1873. The defendants answered, and for their first defense alleged "that the cause of action on which the plaintiff's application is based, accrued to him against the defendants, more than six years prior to the commencement of this suit, by the said plaintiff, and so, they say that the said action is barred by the statute of limitations." To this defense the relator demurred. The court overruled this demurrer, and dismissed the case at his costs. For alleged error in this action of the court below, the plaintiff here prosecutes his petition in error.

The code of civil procedure limits the time within which an action can be brought "upon a liability created by statute, other than a forfeiture or penalty," to six years. (Sec. 14.) This provision is found in title 2, of the Code, the object of which is to define and prescribe "the time of commencing civil actions." The civil action of the code is a substitute for all such judicial proceedings as, prior thereto, were known, either as actions at law, or suits in equity. (Sec. 3.) By section 8, the limitations of this title are expressly confined to civil actions. But proceedings in mandamus were never regarded either as an action at law or a suit in equity, and are not therefore a civil action within the meaning of the code. Mandamus is an extraordinary or supplementary remedy, which cannot be resorted to if the

party has any other adequate, specific remedy. The code provides for and regulates this remedy, but does not recognize it as a civil action. It declares that the writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of law. (Sec. 570.) And in section 577 it provides that: "No other pleadings or written allegation is allowed than the writ and answer."

These are the pleadings in the case, and have the same effect, and are to be construed and may be amended in the same manner *as pleadings*[8] *in a civil action;* and the issues thereby joined must be tried and the further proceedings thereon had in the same manner *"as in a civil action."* This language clearly implies that mandamus is not comprehended within the civil action of the code, to which alone the limitations of title 2 are applicable as an absolute bar.

In holding otherwise, we think the court below erred, and its judgment must, therefore, be reversed. * * *

Judgment accordingly.

STATE v. HOEFFNER.

Supreme Court of Missouri, 1894. 124 Mo. 488.

BURGESS, J.: On the 9th day of February, 1893, there was duly issued from the office of the clerk of the criminal court for the city of St. Louis, a *scire facias* against the defendant, which recited that on the 30th day of April, 1892, the defendant had signed a bond to the state of Missouri in the court of criminal correction in said city as the security of one Lee Qua Lang (who then stood charged in the court of criminal correction with a felony) for his, Lang's appearance in the court of criminal correction, on the 12th day of May, 1892; that default was made in said court on said last named day by said

[8] The general rules of pleading prescribed by the Code may be applicable in mandamus cases, State ex rel. v. Jennings, 56 Wis. 120, (1882). Or, because of the implied exclusion of the extraordinary writs from the general provisions of the Code, the common law rules as to parties and pleading may obtain. State ex rel. v. Williams, 96 Mo. 13, (1888).

Lang, which was certified to the St. Louis criminal court, and judgment of forfeiture rendered thereon. The writ commanded the defendant to appear on the return day thereof, and show cause why the state of Missouri should not have execution. Defendant filed answer to the *scire facias*, putting in issue all the recitals and allegations therein contained.

On the 2d day of October, 1893, the cause was called for trial in the criminal court, when defendant requested and demanded a trial by jury, which was refused by the court, and he saved his exceptions. The court then proceeded to hear the case and made its finding in favor of the state. From the finding and judgment the defendant appealed. The only point urged upon the attention of this court is the action of the trial court in refusing the defendant a trial by jury.

Section 2131, Rev. St. 1889, reads as follows: "An issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial be waived or a reference ordered as hereinafter provided."

Whatever may have been said in other jurisdictions with respect to the nature of a proceeding by *scire facias* on a forfeited recognizance, whether civil or a continuation of the original proceeding, the holding in this state has been, that it is a mere continuation of an original proceeding to enforce the collection of a debt confessed. State v. Randolph, 22 Mo. 474; State v. Heed, 62 Mo. 559. See also Lawton v. State, 5 Tex. 272; 2 Bouvier's Inst., section 3721, chap. 27.

The writ is a common law writ. It is not the commencement of a civil or new action within the meaning of the code, but the writ recites the recognizance and judgment of forfeiture, and requires the parties against whom issued to appear in court, at the next regular term, and show cause, if they can, why final judgment shall not be rendered against them for the amount of the recognizance so forfeited, and execution issued therefor. The practice has been in this state, and many others, to plead to the writ, although our code is silent as to the course to be pursued with respect to a *scire facias* issued upon a forfeited recognizance. Every defense which could be made by way of plea or demurrer to a petition may also be made to the writ, and when demurred to the demurrer goes to the entire record. The writ may be amended when necessary, as pleadings in civil cases, the only difference being that where a demurrer is filed to any

pleading in an ordinary civil action, it only goes to the face of such pleading, while in the case of a demurrer to a *scire facias,* issued upon a forfeited recognizance, it goes to the whole record. State v. Randolph, State v. Reed, supra.

This is not a civil action within the meaning of the code for the recovery of money. Instead of a summons being issued requiring the defendant to appear and answer a petition, as in a civil action, a *scire facias* issued to the defendant requiring him to show cause why a judgment already confessed, interlocutory in its effect, should not be made final, and execution issued thereon, the causes generally shown being *nul tiel record,* release or accord and satisfaction, no one of which, nor all of them, convert the proceedings into an action which is said to be "a legal prosecution in an appropriate court by a party complainant against a party defendant to obtain the judgment of that court in relation to some rights claimed to be secured or some remedy claimed to be given by law to the party complaining." 1 Am. and Eng. Encyclopedia of Law, 178; 1 Wait's Actions and Defenses, 10. It is only in such cases that the parties are entitled to a trial by a jury in civil actions, unless the right is given by statute as in the case of inquiry of damages upon the dissolution of an injunction bond, and cases of like character. If the proceeding had been by suit brought upon the recognizance bond, as is the practice in some of the states, then the rule would be different, and the case triable by jury.

We have not overlooked the case of Milsap v. Wildman, 5 Mo. 425, in which it is held that a *scire facias* is an action, also a suit; and Wolf v. Shaefer, 4 Mo. App. 367, in which the same rule is announced, and in which it is further held that such cases are triable by jury unless the same be waived. To the same effect is State v. Posey, 79 Ala. 45.

The Milsap case was a proceeding by a *scire facias* to revive a judgment in a civil suit, and the Wolf case was a proceeding by *scire facias* in the probate court under the statute against the administrator upon his bond, and are not, therefore, controlling authority in this case. In a criminal case a proceeding on a forfeited recognizance, by *scire facias* is, as has been said, but the continuation of a proceeding already commenced, while in a civil case it is more like an original action.

In Humphries v. Lundy, 37 Mo. 320, which was a proceeding to revive a judgment rendered by a justice of the peace, Holmes,

J., in speaking for the court, says: "A clear distinction is made in the books between an action and a *scire facias*, Mr. Chitty treating of debt on judgments, speaks of the "remedy by *scire facias*," as also frequently adopted, on which damages are not recoverable for detaining a debt, and therefore he considers it more judicious to proceed by action upon a recognizance of bail than by *scire facias*, which is "only a continuance of a former suit, and not an original proceeding." 1 Chitty on Pleading, 127, 299; McGill v. Perrigo, 9 Johns. 259; Brown v. Harley, 2 Fla. 159; Ellis v. Jones, 51 Mo. 187. We think the rule thus announced in harmony with our code and the understanding of the profession generally.

From what has been said, it necessarily follows that section 28, article 2, state constitution, which provides that "the right of trial by jury as heretofore enjoyed shall remain inviolate," has no application to this case. State ex rel. v. Vail, 53 Mo. 97. The judgment is affirmed. All of this division concur.

CHAPTER II.

PARTIES TO ACTIONS.

Section 1. The Real Party in Interest.

Code of Civil Procedure of New York.

§ 449.[1] "Every action must be prosecuted in the name[2] of the real party in interest, except that an executor or administrator,

1 This provision appears in substantially the same form in all of the codes except that of Connecticut. In a number of the codes, there is a proviso to the effect that the section shall not authorize the assignment of a thing in action not arising out of contract.

For the exact wording of this section in the various codes, see: Alaska, Code Civ. Proc. 1900, §§ 25, 27; Arizona, R. S. 1913, §§ 400, 401; Arkansas, Dig. Stat., 1921, §§ 1089, 1092; California, Code Civ. Proc., 1915, §§ 367, 369; Connecticut, Gen. Stat. 1918, § 5655, (allowing assignee and equitable owner of a chose in action to sue in his own name); Idaho, Comp. Stat., 1919, §§ 6634, 6636; Indiana, Burn's Ann. Stat., 1914, §§ 251, 252; Iowa, Comp. Code, 1919, § 7084,; Kansas, Gen. Stat., 1915, §§ 6915; 6917; Kentucky, Rev. Code, 1900, §§ 18, 21; Minnesota, Gen. Stat., 1913, §§ 7674, 7676; Missouri, R. S., 1919, §§ 1155, 1156; Montana, Rev. Code, 1907, § 6477; Nebraska, Ann. Stat., 1911, §§ 1027, 1028, 1030; Nevada, Rev. Laws, 1912, §§ 4986, 4987; New Mexico, Ann. Stat., 1915, §§ 4069, 4070; New York, Civ. Prac. Act., 1920, § 210; North Carolina, Consol. Stat., 1919, §§ 446, 448; North Dakota, Comp. Laws, 1913, §§ 7395, 7397; Ohio, Gen. Code, 1921, §§ 11241, 11244; Oklahoma, Rev. Law, 1910, §§ 4681, 4683; Oregon, Comp. Laws, 1920, §§ 27, 29; South Carolina, Code, 1912, §§ 160, 162; South Dakota, Rev. Code, 1919, §§ 2306, 2308; Utah, Comp. Laws, 1907, § 2902; Washington, Rem. & Bal. Code, 1910, §§ 179, 180; Wisconsin, Stat., 1919, §§ 2605, 2607; Wyoming, Comp. Stat., 1920, §§ 5580, 5582; United States, Equity Rules, 1912, Rule 37.

2 "The general rule is, that the action should be brought in the name of the party whose legal right has been affected, against the party who committed the injury, or by or against his personal representative; and therefore a correct knowledge of legal rights, and of wrongs remediable at law, will, in general, direct by and against whom the action should be brought."—Chitty's Pleadings, 5 Am. Ed. 1.

a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A person, with whom or in whose name, a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section."

WEBB v. MORGAN & CO.

Supreme Court of Missouri, 1851. 14 Mo. 428.

The defendants in error commenced suit against plaintiffs in error in St. Louis Court of Common Pleas on the 13th of July, 1849, on a promissory note, dated 20th Feb'y, 1848, payable to L. M. Wiley & Co., at the office of Loker, Renick & Co., in St. Louis, Mo., for $344, eight months after date. On the 1st July, 1849, Wiley & Co., assigned the same to plaintiffs in court below. The petition describes another note for $343, executed and endorsed as the one first named. By the answer of Webb, one of the plaintiffs in error, he admits the execution of the notes sued on but denies that the defendants in error were the owners of said notes and states that said Wiley & Co. were the only persons really interested in said notes. Hepp, the other plaintiff in error, answers in substance the same as Webb. Judgment was rendered by the court below for the amount claimed, interest, etc. A motion for a new trial was filed and overruled.

It appears that on the trial below the defendants in error admitted that they had no interest in the notes, and were acting merely as agents for Wiley & Co., to collect the same. The reasons contained in the motion for a new trial are that the court erred in entering judgment against plaintiffs in error. That the verdict and finding of the court below were against evidence, against law, and against law and evidence.

Ryland, J.—The only question arising in this case is, can an assignee to whom a promissory note has been assigned for collection, bring the suit on the note in his name as assignee, under the new statute regulating the "practice in courts of justice"? The appellants who were defendants below contend that the plaintiffs below cannot maintain their action, under the above

mentioned statute, because they say that the said plaintiffs were not the party really interested in the suit.

The first section of the 3rd art. of said act is as follows: "Every civil action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section.

"2d Sect. An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, in his own name, without joining with him the person for whose benefit the suit is prosecuted.

Sect. 3. In case of an assignment of a thing in action, the action by the assignee shall be without prejudice to an off-set, or other defence, existing at the time of, or before notice of the assignment; but this section shall not apply to bills of exchange, nor to promissory notes for the payment of money expressed on the face thereof, to be for value received, negotiable and payable without defalcation."

By the act concerning "Bonds and Notes," passed in 1845, see Rev. Code, 1845, p. 190—"all bonds and promissory notes for money or property shall be assignable by endorsement on such bond or note, and the assignee may maintain an action thereon in his own name against the obligor, or maker, etc.

There is no doubt that the Legislature did not intend by the new act concerning "practice in courts of justice," to repeal the law of 1845, concerning Bonds and Notes.[3] They well knew that an assignee could sue in his own name; and the 3d section of the new act above quoted plainly implies the right of an assignee to sue in his own name. But in this case, it is said that the assignees have no interest; they are merely the agents for collection. We consider that the assignment to them creates in them such legal interest, that they thereby become the persons to sue. The assignment passes to them under the law of 1845, the legal title to the note, and make it their duty to sue—and we think the court below acted properly in overruling the defendant's motion, and in rendering judgment for the plaintiffs.

Whenever the evidence shows the endorsement in assignment of the note or bill of exchange or bond to the plaintiff, that as-

[3] The same rule has been embodied in the Negotiable Instrument Act, Harrison v. Pearcy, 174 Ky. 485, (1917); Utah Imp. Co. v. Kenyon, 30 Idaho, 407 (1917).

signment makes such plaintiff the party in legal interest;[4] and authorizes the action in his name.

We cannot believe that the Legislature intended that the courts should permit a defendant to come forward with such a matter of defence as is here set up. If he has a valid claim or defence against the original (payee), he can avail himself of it under the statute; see sec. 3, above quoted.

We think the design of the court below most consonant with the principles of law, and best calculated to promote right and justice.[5]

Judge Napton concurring, it is therefore agreed that the judgment below be affirmed.

WALKER v. MAURO.

Supreme Court of Missouri, 1853. 18 Mo. 564.

GAMBLE, J.: The petition in this case states the fact that Scofield & Ferris were indebted to the plaintiff, and with sufficient distinctness alleges that Mauro, by being the tenant of S. & F. became indebted to them in the sum of $150 for rent. It next states, that S. & F. assigned to plaintiff the debt of the defendant on account of the rent due to them, and that such assignment is evidenced by an order drawn by S. & F. on the defendant for the whole amount due, which order the defendant

[4] In Beattie v. Lett, 28 Mo. 596 (1859), the right of an endorsee to sue in such a case is put on the ground that he is the trustee of an express trust.

[5] Accord: Toby v. Ore. Ry. Co., 98 Cal. 490 (1893); Village of Kent v. Dana, 100 Fed. 56, (1900); Manley v. Park, 68 Kan. 400, (1904); Eaton v. Alger, 47 N. Y. 345, (1872).

Contra: Bostwick v. Bryant, 113 Ind. 448; Abrams v. Cureton, 74 N. C. 523.

Where commercial paper has been transferred by endorsement as collateral security, it is generally held that the holder may sue, Curtis v. Mohr, 18 Wis. 615. Third Nat'l Bank v. Exum, 163 N. C. 199. American Forest Co. v. Hall, 216 S. W. 740 (1919); the endorser cannot sue without a redelivery. But where pledged without indorsement so that the title remains in the pledgor, the latter may sue, Bank v. Hays, 112 Cal. 75, (1896); Dickey v. Porter, 203 Mo. 1, (1907).

For a collection of the cases on the right of an assignee for collection to sue, see note to Stewart v. Price, 64 L. R. A. 581.

refused to pay. The petition was demurred to and the demurrer sustained * * *.

The effect of our new code of practice, in abolishing the distinction between law and equity, is to allow the assignee of a chose in action to bring suit in his own name, in cases where, by the common law,[6] no assignment would be recognized. In this respect, the rules of equity are to prevail, and the assignee may sue in his own name.[7] How far the statute which directs the mode of assigning bonds and notes is affected by this change in our mode of proceeding, we will not now say.

In the present case, as the assignee of the debt due from the defendant to Schofield & Ferris may sue in his own name (2 Story's Eq. § 1057; Dobyns v. McGovern, 15 Mo. 662; Ex parte South, 3 Swanst. 393; Lett v. Morrison, 4 Sim. 607), it only remains to consider whether such an assignment is stated in the petition. It is stated that they assigned the debt to the plain-

6 As to the extent to which assignments of choses in action were recognized at common law, and protection afforded to an assignee in courts of law, see Article by Prof. W. W. Cook on the Alienability of Choses in Action, 29 Harvard Law Review, p. 816.

7 Grover, J. in Depuy v. Strong, 3 Key. (N. Y.) 603; "It is claimed that section 111 of the Code has changed the law in this respect. That section provides that every action must be prosecuted in the name of the real party in interest, with exceptions not applicable to the present case. The only change effected by this provision was to enable courts of law to treat assignments of certain choses in action as transferring the legal title, which at common law, transferred only the equitable."

In Levy v. Levy, 78 Pa. 507, it was held that the effect of the New York Code was to transfer complete legal title to the assignee, so that he could sue in Pennsylvania in his own name, though in case of a local assignment, the action must have been brought in the name of the assignor.

Mr. Justice Davis in Thompson v. Ry. Co., 6 Wall. (U. S. Sup), 134, (1867): "The law of Ohio directs that all suits be brought in the name of the real party in interest. This constitutes a title to sue, when suit is brought in the state court, in conformity with it; and in all cases transferred from the State to the Federal Court, under the 12th section of the Judiciary Act, this title will be recognized and preserved; and when a declaration is required by the rules of the Circuit Court, it may be filed in the name of the party who was plaintiff in the state court." For the present Conformity Act, see U. S. Comp. Stat. 1913, section 1536, ante p. 2.

After a complete assignment, the action cannot be brought by, or in the name of, the assignor, Ins. Co. v. Carnahan, 63 Ohio St. 258 (1900); Whiting v. Glass, 217 N. Y. 333 (1916).

tiff, and that the assignment is evidenced by an order for the amount on the defendant. This is a sufficient assignment of the fund in equity. Lett v. Morrison; Ex parte South; Mandeville v. Welch, 5 Wheat. 277. At law no action could be maintained by the assignee, unless the debtor assumed to pay the amount assigned, but in equity it is different.

The judgment is, with the concurrence of the other judges, reversed, and the cause remanded.

CABLE v. ST. LOUIS MARINE RY. & DOCK CO.

Supreme Court of Missouri, 1855. 21 Mo. 133.

This was an action by the owners of the steamboat James Hewitt to recover damages for the sinking of said boat by the negligence of the defendant.

At the trial there was evidence tending to show that, at the time of the loss, there was an insurance upon three-fourths of the boat, and that immediately afterward and before the commencement of this suit, the interest insured was by the plaintiffs abandoned to and accepted by the underwriters.

The defendant asked the court to instruct the jury that, in respect to the interest abandoned, the right of action was in the underwriters alone, and that they should have been joined as plaintiffs; and that, in any event, the plaintiffs could not recover more than one-fourth of the value of the boat. These instructions were refused, and after a verdict and judgment for the plaintiffs for the value of the boat, the defendant appealed to this court.

SCOTT, Judge, delivered the opinion of the court.

All other questions in this case have been abandoned, except that in relation to the right of the plaintiffs to maintain this action for the entire value of the boat.

There can be no doubt but that the plaintiffs would have been the proper parties to institute this action for the entire sum claimed, had it been brought under our former system of practice. Though there had been an abandonment of the subject insured, and that abandonment accepted by the underwriters, yet

the action would have been properly brought for the full value of the boat in their names.

It remains, then, to be seen whether, under the circumstances of this case, the action is not properly brought in the name of the present plaintiffs, notwithstanding the present practice act. It is not controverted, but is admitted, that a right of action for a portion of the damages arising from the injury to the subject insured, is in the plaintiffs, and that they have the right to recover the value of one-fourth part of the boat, which was lost through the alleged negligence of the defendant.

Now, is there anything in the present practice act which affects or in any way impairs the rule of the common law against dividing a cause of action, or making two causes of action out of one contract or injury by a division of it? The endorsee of a bill of exchange is the legal owner of it, and regularly a suit upon such an instrument must be brought in his own name. But if the holder of a bill assign by way of an endorsement one-half of its amount, would not the action, notwithstanding the assignment, still have to be brought in the name of the holder? By our law, the assignee of a bond is the legal owner of it, and suit thereon must be brought in his name. If the obligee of a bond assign one-half of the sum of it, could the assignee, although the legal owner, maintain an action in his own name for his portion of the debt? In such a case, would not the suit necessarily be brought in the name of the obligee, who would recover the full amount due on the instrument?

A cause of action arising *ex maleficio,* cannot be used as an illustration of this principle, because neither by the common law nor statute was it assignable, so as to enable an assignee to maintain a suit for the damages in his own name.

We do not consider that the provision in the present practice act, which requires actions to be brought in the name of the real party in interest, affects this principle of the common law. Under the former practice, and even now, the legal owner of an instrument transferred by assignment must sue in his own name, yet we have seen that the legal owner of a part of a debt secured by a bond, could not maintain an action on it. It could only be done when he was the assignee of the entire debt. So the statute requiring the real party in interest to sue, should be construed in reference to the principle of the common law above stated, and must be limited to those cases in which the

real party in interest possesses the entire cause of action. The original owner of a cause of action cannot, by parting with a portion[8] of his interest in it, give a right of action to his assignee, neither by the common law nor by anything contained in the present act regulating practice in the courts of justice.

We do not wish to be understood as expressing any opinion as to the manner in which the suit should have been brought had the entire boat been insured by the owners, and they indemnified by their policy.

The other judges concurring, the judgment will be affirmed.

McARTHUR v. GREEN BAY CANAL COMPANY.

Supreme Court of Wisconsin, 1874. 34 Wis. 139.

This action was brought to recover damages for the injury to the barge and the detention of the tug; and the complaint alleges that such injury and detention were caused by the negligence of the defendant in the management of the canal. * * *

The plaintiff was not the owner of the tug; but before the action was commenced, her owners assigned to him their claim for damages for the detention thereof. An objection that this claim is not assignable so that the plaintiff may maintain an action therefor in his own name, was made at the trial and overruled by the court.

The plaintiff recovered for the injury to the barge and for the detention of the tug; and from the judgment in his favor, the defendant appealed.

After an affirmance of the judgment, the defendant moved for a rehearing.[9]

LYON, J.: * * * The question whether the claim for damages for the detention of the tug is assignable, so that the plaintiff, who is the assignee of such claim, may maintain an

[8] In Swarthout v. C. & N. Ry. Co., 49 Wis. 628 (1880), it was held that the insurer in such cases might properly join as plaintiff with the owner; and in Pratt v. Radford, 52 Wis. 114, (1881), it was held, contrary to the view taken in the principal case, that the owner could not sue without joining the insurer as co-plaintiff.

[9] Statement condensed and part of the opinion omitted.

action thereon in his own name, has not been determined, for reasons stated in the former opinion. The learned counsel for the defendant now inform us that they did not intend to waive their objection to the right of the plaintiff to recover such damages, and call upon us to determine the question on this motion; but, unfortunately for us, they have not favored us with any argument or citation of authorities on the question. Still it is our duty to determine it.

The action is to recover damages for injuries to personal property, caused by the negligence of the defendant. It does not arise out of a contract, but sounds in tort. Beyond all question, a right of action for injuries to, or the conversion of personal property, while not assignable at the common law, is assignable in equity, unless that quality is taken away by sec. 12, ch. 122, R. S., which is as follows: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section fourteen; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of a contract."[10] (Tay. Stats. 1418, § 12.) The exception mentioned has no relation to this action. The above provision is contained in the New York code of procedure; and it has been held by the courts of that state in several cases that the last clause of the section does not prohibit the assignment of a thing in action which was assignable in equity before the code was enacted, but only relates to or precludes the assignment of those choses in action for personal torts which die with the party and which never were assignable either in law or in equity. Hence those cases hold that the assignee of a thing in action not arising out of a contract may maintain an action thereon in his own name, in all cases where the cause of action is assignable in equity. Some of the cases hold, or strongly intimate, that survivorship is the test of assignability[1]—that is to say, that every chose in action which survives to the personal

10 This proviso did not appear in the New York Code of 1849, but was added in 1851, See Laws of N. Y. 1851, p. 882. It was omitted from the later revision, ante p. 122. See also Butler v. Ry., 22 Barb. 110; Snyder v. Ry., 86 Mo. 613 (1885).

1 For the rights of action for torts which are assignable, see McKee v. Judd, 12 N. Y. 622 (1855); North Chicago Ry. v. Ackley, 171 Ill. 100, 44 L. R. A. 177, annotated.

As to the effect of statutes making certain rights of action for torts survive, see Wells v. City Hotel Co., 27 L. R. A. (N. S.) 404, annotated.

representative of the party, is assignable in equity, and may be sued upon in the name of the assignee. But whether this be the true test or not, we think the New York courts have given the statute a sound interpretation in respect to the assignability of claims for damages for injuries to property.

The following are some of the authorities which sustain the principles above quoted: The People ex rel. Stanton v. Tioga C. P., 19 Wend. 73; McKee v. Judd, 12 N. Y. 622; Waldron v. Willard, 17 id. 466; Merril v. Grinnell, 30 id. 594; Fulton Fire Ins. Co. v. Baldwin, 37 id. 648; Butler v. N. Y. & Erie R. R. Co., 22 Barb. 110; Dininny v. Fay, 38 id. 18; 1 Chitty's Pl. 69. These authorities are cited in the brief of counsel for the plaintiff. See also R. S., ch. 135, sec. 2, as to survival of actions, and Noonan v. Orton, decided at the present term.

It must be held that the action to recover damages for the detention of the tug was properly brought in the name of the plaintiff.

Motion denied.

E. A. GREEN v. REPUBLIC FIRE INSURANCE CO.

Court of Appeals of New York, 1881. 84 N. Y. 572.

This action was brought upon a judgment of the Circuit Court of Warren County in the State of Mississippi.

That action as appeared by the record was brought and judgment recovered by William R. Greene and others, composing the firm of William R. Greene & Co., for the use of plaintiff upon a policy of insurance issued to that firm by defendant.[2]

MILLER, J.: This case involves the question whether the plaintiff was the actual owner of the judgment on which this suit was brought. We are of the opinion that he was such owner, and as the real party in interest, within the provisions of the Code, the action was properly commenced in his name. The evidence upon the trial clearly established the plaintiff's ownership. The policy upon which the judgment was obtained originally was issued to William R. Greene & Co., and the action

2 Statement condensed and part of opinion omitted.

was brought in their name, the declaration stating that they were copartners "who sue herein for the use of Edward A. Greene."

As the common law prevailed in the State of Mississippi, and a chose in action was not assignable, the suit could not be brought there in the name of Edward A. Greene, the real owner; and it seems that the laws of Mississippi authorize the statement made in the complaint, and which was followed in all the pleadings and in the judgment record, to the effect that the action was for the use and benefit of Edward A. Greene. As the pleadings and the record stand, every presumption is in favor of the ownership of Edward A. Greene. * * *

The bringing of an action for the use of a party in interest, in accordance with the common-law rule that a chose in action is not assignable, is recognized in the decisions. (Morton v. Morton, 13 Serg. & Rawle 107; Welch v. Mandeville, 1 Wheat 233 and note; McCullon v. Coxe, 1 Dallas 139; Canby v. Ridgway, 1 Binney 496; Southgate v. Montgomery, 1 Paige 41-47.)

The plaintiff in such an action is merely a nominal party. He has no actual interest in the suit, cannot control it, nor in any way interfere with the rights of the real party; nor is he a trustee in any sense, as he has no authority whatever. The owner alone is the real party, and it is only by reason of the rule referred to, which in this State has been superseded by the Code, that the action is brought in this form. The judgment[3] belongs to the owner quite as much as if he was named as the plaintiff, and under the Code he alone can sue to recover the same. The other objections urged as to the right of the plaintiff to maintain this action do not, we think, demand discussion. * * *

The judgment of the General Term was right and should be affirmed, and under appellant's stipulation judgment absolute should be ordered for the plaintiff.

3 That a judgment of a court of record of another state must be treated as a debt of record under the "full faith and credit" clause of the constitution of the United States, see Andrews v. Montgomery, 19 John, 162, (N. Y. 1821).

ANDERSON v. REARDON.

Supreme Court of Minnesota, 1891. 46 Minn. 175.

Appeal by plaintiff from an order of the municipal court of St. Paul, refusing a new trial after a dismissal ordered at the trial in an action to recover $98 for goods sold and delivered to defendant by one Marie Scherer, the plaintiff's assignor.

Mitchell, J.: One Mrs. Scherer executed to plaintiff a written assignment of the demand upon which this action was brought. It appeared from the evidence that, although the written assignment was unqualified and unrestricted in its terms, yet there was a verbal understanding between the assignor and the assignee that out of the proceeds of the claim, when collected, the latter was to retain the amount due him for services already rendered, and to be thereafter rendered by him to the former, and also pay certain debts owned by her to third parties, and then remit the balance, if any, to her. It also appeared that, when this action was commenced, the plaintiff had already collected on the demand enough to pay his own claim for services up to that time. When the plaintiff rested, the trial court dismissed the action, on the ground that the plaintiff was not the real party in interest. This was error. By virtue of the assignment the plaintiff became the legal owner of the claim, and as such could maintain the action. It is no concern of the defendant whether the assignee of a claim receives the money on its own right or as the trustee of the assignor.[4] It is enough for him to know that the plaintiff is the party in legal interest, and that a recovery by him will be full protection against another suit by the assignor. There is no room for the distinction in this respect sought to be made by defendant between negotiable paper and other choses in action.[5] Castner v. Austin, 2 Minn. 32 (44); Vanstrum v. Lil-

[4] Accord: Hall v. Mass. Bond Co., 86 Kan. 342, (1912); Sheridan v. Mayor, 68 N. Y. 30, (1876); King v. Miller, 53 Or. 53 (1909); Hankweitz v. Barrett, 143 Wis. 639, (1910). For the contrary view, see Stewart v. Price, 64 L. R. A. 581, annotated.

An assignee for collection is not the "equitable and bona fide owner", and therefore not entitled to sue under the terms of the Connecticut Code, Muller v. Witte, 78 Conn. 495, (1906).

[5] In Gay v. Orcutt, 169 Mo. 400, (1902), where a number of claims had been assigned for purposes of suit, the assignee attempted to

jengren, 37 Minn. 191 (33 N. W. Rep. 555); Elmquist v. Markoe, 45 Minn. 305 (47 N. W. Rep. 970). It is suggested that certain exhibits which were introduced in evidence are not made a part of the settled case. This is true, but we think that their nature and contents sufficiently appear from the "case."

Order reversed.

CASSIDY v. FIRST NATIONAL BANK.

Supreme Court of Minnesota, 1882. 30 Minn. 86.

BERRY, J.: The defendant issued the following instrument, signed by its president:

"First National Bank,
"Faribault, Minnesota, June 1, 1880.

"Jerry Cassidy, Esq., has deposited in this bank $1,050 payable to himself or order, in current funds, on the return of this certificate properly indorsed."

The money deposited was the property of plaintiff, by whom it was handed to Jerry Cassidy, her husband, to be deposited in the defendant bank in his or her name as he saw fit. Immediately upon receiving the certificate he delivered it to plaintiff, who ever since has had its exclusive possession and control, and has been the real owner of the debt evidenced by it. Before the commencement of this action she presented the certificate to defendant and demanded payment of the balance due thereon,

dismiss, but the trial court permitted the assignors, on giving bond, to proceed with the action in the name of the assignee. On appeal it was held that the assignors had no standing to interfere with the action, which the assignee might continue or dismiss as he saw fit.

Under the former practice the law courts fully recognized the standing of an assignee to control an action brought in the name of the assignor, and afforded protection against the assignor's acts. Thus, in Legh v. Legh, 1 Bos. & P. 447, (1799), the court set aside a plea of release and ordered the cancellation of a release executed by the assignor after notice to the defendant of the assignment. The same course was followed in Payne v. Rogers, 1 Doug. 407, (1780) where the action had been brought by the landlord in the name of his tenant.

at the same time informing defendant that she was its lawful owner and holder, and offering to surrender it upon payment. Defendant refused payment upon the ground that the certificate had not been indorsed, and was claimed by Jerry Cassidy as his own. In fact, it has not been indorsed.

The certificate is in effect a negotiable promissory note. Pardee v. Fish, 60 N. Y. 265; Klauber v. Biggerstaff, 47 Wis. 551 (S. C. 3 N. W. Rep. 357). The fact that the sum named in it is payable "on the return" of the certificate does not raise a contingency affecting its character as such note. In the absence of these words, the duty to return upon payment would be implied, as in case of a negotiable promissory note in common form. Notwithstanding it is made payable to the depositor or his order, a third person may become its owner without indorsement. This is, in effect, determined in Pease v. Rush, 2 Minn. 107 (Gil. 89). In that case the title of a note made payable "to the order" of certain persons named was held to pass by delivery without the indorsement[6] of the persons to whose order it was payable. That case also determined that the party acquiring title by such delivery without indorsements was the real party in interest, who was, therefore, under our practice, entitled to maintain an action upon the note in his own name. See also Foster v. Berkey, 8 Minn. 351 (Gil. 310); White v. Phelps, 14 Minn. 27.

It is impossible to distinguish the case at bar in principle from the cases cited. Here the sum named in the certificate is payable to Jerry Cassidy or his order upon the return of the certificate properly indorsed. In the case cited from 3 Minn., the sum named in the note was payable "to the order" of the persons named therein; that is, in legal significance, to those to whom they should order it to be paid by their indorsement, and upon the return or delivery up of the note. There is no substantial difference between the two cases. In either, title may be acquired by delivery, and thereupon the owner and holder, as the real party in interest, may maintain an action for the contents of the instrument in his own name. If in the one case the note, or in the other (as here) the certificate, is claimed by

6 Acc: Boeka v. Nuella, 28 Mo. 180, (1859); for a collection of the later cases, see, note to 27 L. R. A. (N. S.) 1113.

The same result seems to have been accomplished by the negotiable Instrument Act, Goodsell v. McElroy, 86 Conn. 402, (1912).

some person other than the plaintiff, the maker of the note or the certificate may protect himself by bringing the money into court and compelling an interpleader under section 131, c. 66, Gen. St. 1878. Judgment for the plaintiff was properly ordered and entered below, and is accordingly affirmed.[7]

KINGSLAND v. CHRISMAN.

Court of Appeals of Missouri, 1887. 28 Mo. App. 308.

This is an action in replevin for the recovery of the possession of certain personal property. The facts are as follows: On the fourth day of May, 1884, one W. C. Everett sold to one Stephen Gaucher the property in controversy, for which Gaucher executed to Everett his promissory note. To secure this note, Gaucher executed, on the same day, a chattel mortgage on the property to Everett. Before the maturity of the note, Everett assigned the same, by writing his name on the back thereof and delivering it to one Sheldon, for a valuable consideration; and, thereafter, and before the maturity of the note, said Sheldon, in the same manner, assigned the note to plaintiff, for a valuable consideration. By the terms of the mortgage the mortgagor was to retain the possession of the mortgaged property until default in paying the note. After the maturity of the note, the debt being unpaid, the defendants were in the possession of the property mortgaged. How they acquired this possession does not appear. In their answer they pleaded ownership. At the trial the plaintiff, after proof of the foregoing facts, rested. Thereupon the defendants demurred to the evidence. The court sustained the demurrer and plaintiff has appealed.

[7] In McDowell v. Bartlett, 14 Ia. 157 (1862), plaintiff was allowed to sue in his own name as equitable owner of a note payable to a third person, though plaintiff did not obtain possession of the note until after the death of the payee.

See also Seattle Nat'l Bank v. Emmons, 16 Wash. 585, (1897), where the plaintiff to whom the original note had been assigned was allowed to sue in his own name on a renewal note given to him by the maker, but payable to the assignor.

Phillips, P. J. This case presents the single question, can the assignee of a debt, secured by chattel mortgage, without an assignment of the mortgage itself, maintain, in his own name, the action of replevin for the recovery of the possession of the mortgaged property? The court below held that he could not.

At first impression this question seems easily answered. But in the absence of any direct adjudication by our supreme court, I find it, on examination of the authorities, by no means free from embarrassment. There is no question of the general proposition, that the assignment of the note carried the mortgage with it. The debt is the principal thing; the mortgage, which is but the security, is the mere incident of the debt; and on the maxim, *omne principale, trahet ad se accessorium,* where the debt goes the mortgage follows. But the courts say that this following of the mortgage after the debt, where only the debt is formally assigned, is but an equitable assignment as to the mortgage, and not a legal transfer. Thus Richardson, J., in Anderson v. Baumgartner (27 Mo. 86), said: "The doctrine is well settled that the transfer of a deed [debt?] carries with it *in equity* the mortgage as a security." In Tisen v. People's Ass'n (57 Ala. 331), Brickell, C. J., said: "An assignment of the debt would in equity pass the mortgage." And likewise, Wilde, J., in Crain v. Pain (4 Cush. 485) treats the transfer of the mortgage as an incident of the debt, as an equitable transfer. Accordingly, Jones in his work on Chattel Mortgages, section 503, asserts the doctrine to be that: "The mortgagee's legal interest does not pass by his assignment of the debt. Such assignee cannot maintain replevin in his own name for the mortgaged property; though he may in the absence of any express or implied stipulation to the contrary, bring such actions in the name of the mortgagor, who holds, in such case, the legal title in trust for such assignee's benefit." In support of the text, the case of Ransdall v. Tewksbury (73 Me. 197) is cited. The case fully sustains the proposition. The argument is, that the interest of the mortgagee in the property vests solely by virtue of the mortgage, which represents the property. Had no mortgage been taken he would have had no property, title or interest whatever in the property. The note in nowise had any effect upon the title to the property. The whole office of the note being limited to the payment of the consideration for the property sold by the mortgagee to the mortgagor, the assignment of

the note could not affect the title to the property it was given to pay for. The assignment of the debt gave to the assignee an equitable interest, at least, in the mortgage, the mortgagee holding it in trust for the benefit of the holder of the debt. Such equitable interests are protected by the courts of law, and may be enforced in the name of the party holding the legal, as distinguished from the equitable, title. This seems to be the holding in Massachusetts and Alabama. Crain v. Pain, *supra;* Prout v. Root, 116 Mass. 410; Graham v. Rogers, 21 Ala. 498; see also Harman v. Barhytt, 31 N. W. Rep. 488, and note.

Most of the cases, which I have been able to find, where the assignee was allowed to maintain the action in his own name, is where the mortgage itself was assigned in writing. In such case the assignee, without question, holds the legal title. In Langdon v. Buel (9 Wend. 80),[8] the action was trespass *de bonis asportatis,* brought in the name of Langdon, who was the mortgagee, but who had previously transferred the note, secured by the mortgage, to one Pitcher. Spencer, C. J., said: "A mortgagee of personal property, upon the failure of the mortgagor to perform the condition of the mortgage, acquires an absolute title to the chattel. The notes which this mortgage was given to secure appear to have been assigned or transferred to one Pitcher. When they were so transferred does not appear. * * * Did not the mortgage pass with the notes as incident to them, and should not the action have been brought in the name of Pitcher instead of Langdon? I do not perceive how such conclusion is to be resisted. A mortgage of real or personal estate is but an accessory or incident to the debt, or the security which is given as the evidence of the debt. The assignment of the security passes the interest in the mortgage. The mortgage can not exist an an independent debt. If, by special agreement, it does not accompany the security assigned, it is, *ipso facto,* extinguished, and ceases to be a subsisting demand. If the notes were endorsed or assigned to Pitcher before they became due and before the mortgage was forfeited, the inchoate interest of the mortgagee, must have passed with them. If the transfer of the notes was after they fell due and subsequent to the forfeiture of the mortgage, then the assignment operated

8 This case was decided in 1832, long before the adoption of the Code.

as a transfer of the interest of the mortgagee, Langdon, whatever it might have been, in the mortgaged chattel; and in either aspect the action of trespass should have been brought in the name of Pitcher."

In Woodruff v. King (47 Wis. 261), the action was replevin by an assignee of the debt; and his right to maintain the action passed unchallenged by counsel and court, with the observation, that the note being negotiable, and in the hands of the plaintiff, was presumptive evidence of ownership; "and the transfer of the note carried with it the mortgage security," citing Rice v. Cribb (12 Wis. 182), in which it is said: "The transfer of the notes carries with them the interest in the mortgage." * * *

It seems to stand to reason that, as the debt and the security are inseparable, so they cannot reside at the same time in different parties, and he who controls the debt also controls the mortgage, the assignee of the debt should acquire the same rights and have the same remedies, both as to the debt and the security, which the mortgagee,—his assignor,—had at the time of the transfer, or the maturity of the debt had he then held it. It is the well settled law that the mortgagee, after the maurity of the debt, has three independent remedies open to him, which he may pursue successively. He may reduce his debt to judgment against the mortgagor, or foreclose the mortgage and sell the property, or bring an action for the recovery of the possession. That the assignee of the debt may pursue in his own name the first two remedies, no court questions. Why, then, make a distinction as against the third remedy, and as to that break the unity as to right and remedy? The only answer made is, that the mortgage is only equitably assigned. The same objection, it occurs to me, might with the same force be alleged against the foreclosure proceedings in the name of the assignee. It is conceded in Ramsdell v. Tewksbury (supra), that such equitable interest may be enforced in a possessory action in the name of the assignor—the mortgagee—to the use of the assignee. Our practice act (sec. 3465) provides that, "every action shall be prosecuted in the name of the real party in interest," allowing to administrators, executors, and trustees of express trusts, the right of action in their names. I am unadvised as to whether a corresponding provision exists in the statutes of Maine, and those states maintaining the doctrine in Ramsdell v. Tewksbury. But I understand that one of the very objects in the enactment

of this provision of the code was to obviate the useless form of employing the name of an assignor in an action, who had no real interest in the subject-matter of litigation, and who, when the judgment was obtained in his name, would hold the same in trust for the benefit of the real party in interest.

In City of St. Louis to use v. Rudolph (36 Mo. 465), the plaintiff sued as assignee of certain tax bills issued by the city to Ursula Buol. The court said: "Her assignment of the bill may be regarded as an assignment of the cause of action, and it vested in him the whole equitable interest in the demand. He thus became the real party in interest."

In Edgell v. Tucker (40 Mo. 531), the court again seem to recognize the principle that, where there is an equitable assignment of the thing, the beneficiary may maintain the action, quoting from Tindall, C. J., in Crowfort v. Gurney (9 Bing. 372), —"These circumstances amount to an equitable assignment of the debt due from Gurney to Streather, for Solly might have gone into a court of equity to compel a formal assignment, and no answer could have been given to such an application."

Certainly, where a court of equity would compel the depositary of the naked legal title to assign the instrument to the assignee, under our code, he must be the real party in interest. And it does seem to me that the spirit and object of the statute will be best expressed and executed in allowing this plaintiff to proceed in his own name, immediately, to enforce his possessory right under the mortgage, rather than to compel him either to resort to the circumlocution of a bill in equity to compel an assignment of the legal title, or to bring replevin in the name of the mortgagee.[9]

The cases to which counsel for respondents refer in his brief are mainly instances of deeds of trust on real estate made to a trustee. In such case the legal title is vested in the trustee, mutually selected by the parties as such depositary, to hold in trust for both parties. His is a naked power, not transferable, and he alone can maintain action for the possession. Pickens v. Jones, 63 Mo. 199; Siemers v. Shraeder, 84 Mo. 20-23; Meyers v. Hale, 17 Mo. App. 205.

9 Accord: Bank v. Ragsdale, 158 Mo. 668 (1900), approving the principal case. See also Nat'l Market Co. v. Maryland Casualty Co., 170 Pac. 1009 (Wash. 1918), allowing the assignee of a pay check to sue on a surety bond given to secure workmen subcontractors, etc.

It follows that the judgment of the circuit court is reversed and the cause remanded. All concur.

BAILEY v. WINN.

Supreme Court of Missouri, 1890. 101 Mo. 649.

Ejectment for certain lands in Macon county. On writ of error by defendant to reverse the judgment below in favor of plaintiff.

BLACK, J.[10] * * * The second alleged title of the plaintiff is this: Edward Edwards and his wife, by their mortgage deed, dated January 11, 1871, conveyed the one hundred and twenty acres of land to David W. Williams, to secure a note of the same date, executed by Edwards and payable to Williams for six hundred and seventy dollars, due in two years. David W. Williams acknowledged satisfaction in full on the margin of the record, under date of August 13, 1879. Plaintiff, however, produced in evidence the note with two assignments indorsed thereon, one from Williams to Edward A. Edwards and the other from him to plaintiffs. Edward A. Edwards testified that he had purchased this note from Williams on Aug. 9, 1879, and had it assigned to himself on that day, and that the marginal satisfaction was made without his knowledge or consent, and after he had become the owner of the note. He says he had previously contracted for the note, had made several payments, and that the payment of $206.20, on Aug. 9, was the last one. Concede that Edward A. Edwards became the owner of the note by assignment, and that he assigned it to plaintiff, still we do not see how the plaintiff can recover in this action of ejectment on the mortgage. There is no doubt but a mortgagee, after condition broken, may recover in ejectment against the mortgagor and those claiming under him. Sutton v. Mason, 38 Mo. 120; Johnson v. Houston, 47 Mo. 230. The assignment of the debt carries the security, so that the assignee may foreclose the mortgage. But the mortgagee may recover in ejectment, because, after condition broken, he is in law regarded as the owner of

[10] Statement condensed and part of opinion omitted.

the estate. The legal title vests in him for the protection of the debt, but for no other purpose. Before the assignee of the debt can recover in ejectment, he must show a transfer of this legal estate to himself. We have held that the beneficiary in a deed of trust to secure the payment of a debt cannot maintain ejectment, after condition broken. Siemers v. Shrader, 88 Mo. 20. So in the case of an ordinary mortgage, the mere assignment of the debt does not vest the title of the mortgagee to the land in the assignee. Jones on Mortgages (4th ed.) sec. 818. In the present case, there was no assignment of the mortgage or transfer of the estate by the mortgagee, and it follows from what has been said that plaintiff cannot recover on the mortgage, even if he is the owner and holder of the note.[1] * * *

The judgment is reversed and the cause remanded. All concur.

ALLEN v. CHICAGO & NORTHWESTERN RY. CO.

Supreme Court of Wisconsin, 1896. 94 Wis. 93.

The action is for a negligent fire which burned a quantity of hay belonging to the plaintiff. The answer alleges that the hay was insured against fire, and that the insurer has paid the loss in full to the plaintiff. The plaintiff demurred to this answer

[1] And so in Williams v. Teachy, 85 N. C. 402, (1881), that the assignment of a note and mortgage did not pass the mortgagees' legal title to the land.

Dickey, J., in Kilgour v. Gockley, 83 Ill. 109, (1876): * * * "Though the assignee of a mortgage, and of the note secured by the mortgage, may not be able to maintain an action upon the mortgage, in his own name, by virtue of such assignment, nevertheless, being the lawful owner of the note, he has the right to use all remedies necessary for the collection of it, and has the right to use the name of the mortgagee in enforcing any remedies which by law can be made available for that purpose. He might bring ejectment in the name of the mortgagee, and the assignment of the note and mortgage would be a full authority for such use of the name of the mortgages, and, after judgment in such ejectment in his favor and against the mortgagor, the assignee of the mortgage could lawfully accept the possession in the name of the mortgagee, acting as the agent of the mortgagee and for his own benefit." * * *

as not stating a defense. The demurrer was sustained, and the defendant appeals.

Newman, J. The plaintiff, in his brief, denies that he has been paid his loss by the insurer. In that case it was imprudent in him to demur to the answer, for by his demurrer he admits all the material allegations of the answer to be true. This is elementary. It is the settled law in this state that the acceptance of payment of his loss from the insurer substituted the insurer in all his rights against the railroad company. It put the insurance company, in all respects, into the place which he occupied in relation to his claim against the railroad company, so that it can bring suit against the railroad company, upon his original cause of action, in its own name. Swarthout v. C. & N. W. R. Co., 49 Wis. 625. All this is utterly inconsistent with any theory that, in a case where the whole loss is paid by the insurer, any right of action remains in the insured;[2] nor can he, by any act, defeat the right of such insurer. The acceptance of payment from the insurer operates as a virtual assignment of the cause of action to the insurer, and a part payment operates as an assignment *pro tanto*.[3] Pratt v. Radford, 52 Wis. 114. Else the defendant might be called upon to pay twice, and the insured might recover twice, for the amount of his loss. This leads to absurdity. In this state no action could be brought in the plaintiff's name for the benefit of the insurer.[4] Every action must be brought in the name of

2 Contra: Ill. Central Ry. v. Hicklin, 131 Ky. 624, 115 S. W. 752, 23 L. R. A. (N. S.) 870, (1909) annotated; Alaska S. S. Co. v. Sperry, 94 Wash. 227, (1909). See also Swift v. Wabash Ry. 149 Mo. App. 526, (1910), in which a recovery was allowed in the name of the owner, though the loss had been paid in full by several separate insurers, on the ground that the claim of each to a proportional part was purely equitable. The same state of facts existed in Cunningham v. Ry. 139 N. C. 427, (1905), but the point was not raised.

3 Where the insurance is less than the amount of the loss, the insurer cannot sue alone, Norwich Ins. Co. v. Standard Oil Co., 59 Fed. 984, (1894). For a joinder by the insured and the insurer, see note to Cable v. Dock Co., ante p. 127.

4 Accord: Cunningham v. Ry. 139 N. C. 427, (1905); Ry. v. Blunt, 165 Fed. 258, (1908); Ins. Co. v. Great Lakes Co. 184 Fed. 426, (1911). A number of the later cases are collected in the note to Wyker v. Texas Co. L. R. A. 1918 F. 142. See also Lord v. Yale, 230 N. Y. 132, (1920), that the insured has no interest which makes it proper to join him as a co-plaintiff with the insurer.

the real party in interest. The answer, while undoubtedly sufficient in substance, sets out the defense but meagerly and without detail. It could not be gathered from it who the insurer is, nor how much was paid. Much which might become important is absent. But, if the plaintiff desired more certainty of statement, his remedy was by a motion for that purpose.

By the Court.—The order of the circuit court is reversed, and the cause remanded with direction to overrule the demurrer.

HOFFMAN v. CITY OF COLUMBIA.

Court of Appeals of Missouri, 1898. 76 Mo. App. 553.

SMITH, P. J. This is an action by the plaintiff against defendant, a city of the third class, to recover damages occasioned by the action of the latter in changing the grade of certain designated streets in front of the property of the former, in pursuance of an ordinance passed for that purpose. At the time of the passage of the ordinance Mrs. Riggins was the owner in fee of the property and between that time and the change of the grade of said streets, she entered into a written contract with the plaintiff for the sale of the property and the execution of a deed therefor. The deed was not executed until a few days after the completion of the street improvement. The evidence abundantly shows that the property was greatly damaged by the grading of the streets. There was a trial resulting in judgment for the plaintiff and the defendant appealed.

The defendant contends that inasmuch as the plaintiff was a mere vendee under an executory contract of sale that he was not such an owner of the property as entitled him to recover damages for injuries done thereto, prior to the time of the delivery of the deed to him. Our Practice Act—Revised Statutes 1889, section 1990,—requires that every action shall be prosecuted in the name of the real party in interest. The question here is, who was the real party in interest at the time of the injury to the property?

Snyder v. Murdock, 51 Mo. 175, was where defendant had given his notes for real property and the plaintiff had given bond for title. The carding machine and mill situate on the

property were destroyed by fire before the payment of the notes or the making of the deed. In a suit on the notes the defendant pleaded as a defense that the carding machine and mill gave the property great value and were the main inducement to the purchase, etc. In the course of the opinion in the case, it is said that: "After an executory contract for a conveyance of real estate has been entered into by the execution of a bond for title and notes for the purchase money, the property is at the risk of the purchaser. If it burns up, it is his loss; if it increases in value, it is his gain. This is the settled equity doctrine, and is based upon the principle that in equity what is agreed to be done must be considered as done."

In Walker v. Owen, 79 Mo. loc. cit. 569, the defendant, under a title bond, took possession of the premises. There was on the lot a store house of which the defendant took possession, under his contract, and used the same for several months and was so using it when it burned down. It is said by the court, in deciding the case, "that when a vendee thus takes possession of real estate, under a title bond, from the vendor, and the improvements thereon are destroyed, the loss falls on the vendee." Snyder v. Murdock, 51 Mo. 175. The defendant is not in a position to rescind the sale if he desired, for he cannot put the vendor in *statu quo* by restoring to him the property he obtained from him. See, also, Deland v. Vanstone, 26 Mo. App. 297; Woods v. Straup, 63 Mo. 433; Tatum v. Brooker, 51 Mo. 148.

It has been twice held by the supreme court of Michigan that where persons holding lands under a contract for sale which does not give them any possessory right therein before completion of payment therefor, cannot, before such payment, maintain an action for damages done to such land, since they are not the owners of the freehold. Moyer v. Scott, 30 Mich. 345; Des Jardins v. Boom Co., 54 N. W. Rep. 718. It does not appear, from the meager statement made in Snyder v. Murdock, *supra,* whether or not the vendee was put in the actual possession of the property, but it may be fairly inferred that such was the fact. That is the way it is to be understood. Walker v. Owen, *supra.*

It appears from the contract of sale that Mrs. Riggins should reserve in her deeds the rents, issues and profits of said property up to July 1, 1897—more than six months after the date

of the injury—and that the plaintiff should not disturb the tenant in possession until the last-named date. It is thus seen that the plaintiff, at the time of the spoliation of the property, of which he complains, was not then in either the actual or constructive possession. Though the plaintiff had only a contract for the conveyance to him of the title to the property, yet the action could have been maintained by him if he had been placed in the actual possession thereof by his vendor. There is nothing in the contract which had the effect to make the subsequent deed operate by relation back to the date of the contract. The plaintiff, by the terms of the former, was not entitled to the latter, until he made the payment of a certain amount of the purchase money and secured the remainder thereof in either one of the two ways stipulated. And as the land was not paid for, and the plaintiff could not have possession until after payment of part of the purchase money, the giving of the stipulated securities for the deferred payments, it is plain that the vendor had a valuable interest therein and not a mere naked title, and that an injury to the land was an injury to her. We, therefore, conclude that the plaintiff was not the real party in interest, in the statutory sense, and the action was improperly prosecuted in his name. It results that the demurrer to the evidence, interposed by the defendant, should have been sustained.[5]

As the ruling just made is decisive of the cases on the merits, it becomes wholly unnecessary to notice the question of the sufficiency of the defense pleaded by the answer and stricken out by the trial court on the motion of the plaintiff.

Judgment reversed.

[5] For a collection of later cases on this point, see note to Foster v. Lumber Co., 20 Okla. 553 (1908), 30 L. R. A. (N. S.) 231. For the right of the vendor see Northrup v. Trask, 39 Wis. 515, (1876) in which it was held that the vendor could not maintain an action for the conversion of a building severed and removed by the vendee in possession, because the equitable title and possession were in the latter.

Compare Harker v. Birkbeck, 1 Wm. Blackstone, 482 (1764) holding that an equitable assignee of a lease, in possession of the premises, could maintain trespass against a stranger for the removal and conversion of coal.

STILWELL v. HURLBURT.

Court of Appeals of New York, 1858. 18 N. Y. 374.

Appeal from the supreme court. Action upon a bond to the plaintiff, sheriff of Oswego, reciting the issuing of an execution directed to the plaintiff against one Eri D. Harrington, and that certain goods and chattels which appeared to belong to the latter were claimed by Wm. H. Harrington and conditioned to indemnify the plaintiff and all persons aiding or assisting him in the premises, from all damages for levying upon and selling the property. The breach was the recovery, by one Capron, of a judgment against Lee, a deputy of the plaintiff, for the seizure and sale by the latter of the property levied upon; the payment by Lee of the judgment and costs of defending the action in which it was recovered, and the neglect of the defendants to indemnify Lee. The complaint stated an assignment by Lee, to the plaintiff, of his interest in the bond and of his right of action, by reason of the facts stated. Upon the trial there was a failure to prove that the assignment was ever delivered to the plaintiff, or that he knew of its existence. The defendants moved for a non-suit, which was denied. The plaintiff had a verdict, which the supreme court, at general term in the fifth district, refused to set aside; and judgment thereon having been perfected, the defendants appealed to this court.

HARRIS, J. At the time the bond upon which this action is brought was executed, the plaintiff was sheriff of Oswego and Lee was his deputy. An execution in favor of the defendant against one Harrington, had been delivered to Lee as such deputy, and property in the possession of the defendant in the execution had been seized by him. To induce the deputy to sell the property thus taken in execution, and which might belong to some other person, the defendants, who were plaintiffs in the execution, executed the bond in question. Aware that any person claiming the property which had been taken might, at his election, sue either the sheriff or his deputy, it was made a condition of the bond, that the defendants should indemnify not only the sheriff, but "all and every person and persons aiding and assisting him in the premises." In respect to the deputy who held the execution, and who in fact received the bond, the plaintiff became the trustee of an express trust. The obliga-

tion was executed to him for the benefit[6] of his deputy. It is the precise case for which provision is made in the 113th section of the code. The suit was properly brought in the name of the sheriff. The deputy having been sued for the price of a wagon he had sold under the defendant's execution, and a judgment having been recovered against him, the defendants became liable, according to the condition of their bond, for the amount recovered against him, together with the expenses incurred by him in defending the action. Without reference, therefore, to the assignment of the demand to the plaintiff, or whether such an assignment was perfected or not, the action was well brought and the recovery right.

The judgment of the supreme court should therefore be affirmed.

BURR v. BEERS.

Court of Appeals of New York, 1861. 24 N. Y. 178.

Appeal from a judgment of the Supreme Court. The action was brought to recover the amount of two mortgages executed, with his bonds, by E. F. Bullard to John Cramer, committee of the estate of Charles Burr (the plaintiff's intestate), for $1,000 and $2,000 respectively. After giving the mortgages, which covered several parcels of lands, Bullard conveyed both parcels to the defendants by a deed containing a recital and covenant in the following words: "Subject to two mortgages held by John Cramer, committee of the estate of Charles Burr, bearing date, etc., (describing the mortgages), which mortgages are deemed and taken as a part of the consideration of this conveyance, and which the party of the second part hereby assumes to pay." Charles Burr was restored to the possession and control of his

6 The general subject of contracts for the benefit of third persons, and the effect of the Code in developing that branch of the law, can not be treated satisfactorily in a course primarily concerned with procedure. The few cases on that phase of the law in this collection are suggestive merely. For a discussion of the matter from the standpoint of the law of contracts, see an article by Professor Williston, 15 Har. Law Rev. 767.

estate, by an order of the Supreme Court; and he prosecuted this suit to judgment, but died pending this appeal, when the action was continued in the name of the plaintiff as his administratrix. The plaintiff on the trial proved the actual delivery of the deed by Bullard, to the defendant. The defendant objected that there was no privity of contract between him and the plaintiff; but the justice (before whom the case was tried without a jury) held otherwise. Judgment was given for the plaintiff for the amount of the mortgages, which was affirmed at a general term when the defendant appealed to this court.

Denio, J. If the plaintiff had sought to foreclose the mortgages in question, and to charge the defendant with the deficiency which might remain after applying the proceeds of the sale, and had made both the mortgagor and the present defendant parties, the authorities would be abundant to sustain the action in both aspects. (Curtis v. Tyler, 9 Paige 432; Halsey v. Reed, id. 446; March v. Pike, 10 id. 595; Blyer v. Monholland, 2 Sandf. Ch. R. 478; King v. Whitely, 10 Paige 465; Trotter v. Hughes, 2 Kern. 74; Vail v. Foster, 4 Comst. 312; Belmont v. Coman, 22 N. Y. 438.) But I do not understand that the right to a personal judgment for the deficiency is based upon the notion of a direct contract[7] between the grantee of the

[7] Mr. Justice Gray in Union Life Ins. Co. v. Hanford, 143 U. S. 187 (1891): * * * "By the settled law of this court, the grantee is not directly liable to the mortgagee, at law or in equity; and the only remedy of the mortgagee against the grantee is by bill in equity in the right of the mortgagor and grantor, by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt. Keller v. Ashland, 133 U. S. 610; Willard v. Wood, 135 U. S. 309. * * *"

In the case of In re Rotheram Alum Co., L. R. 25 Ch. D. 103, (1883), a solicitor who had been employed by the promoter of a corporation and performed services in its organization, sought to recover his charges in an equitable proceeding winding up the company, basing his claims on a contract between the promoter and the company by which the latter agreed to pay such expenses. The plaintiff was denied relief, apparently, because of setoffs in favor of the company against the promoter. On the question of direct liability Lord Justice Lindley observed:

"If he had brought this action against the company with no materials except proof that he had done the business, and the provisions in the articles, he could not have succeeded. This is shown by many cases, amongst which I may refer to Eley v. Positive Government Security Life Assurance Com-

equity of redemption, and the holder of the mortgage. The cases proceed upon the principle, that the undertaking of the grantee to pay off the incumbrance is a collateral security acquired by the mortgagor, which inures by an equitable subrogation to the benefit of the mortgagee. Then the statute relating to foreclosures provides, that if the mortgage debt be secured by the obligation or other evidence of debt executed by any other person besides the mortgagor, such person may be made a defendant, and may be decreed to pay the deficiency. (2 R. S. p. 191, § 154.) Chancellor Walworth, puts the right to a personal judgment in such a case, upon the equity of this statute (9 Paige 432); and Vice-Chancellor Sanford, expressly says, that the obligation is not enforced as being made by the grantee of the equity of redemption under such a deed, to the mortgagee, but as a promise by the former to the mortgagor, to pay him the amount of the mortgage, by paying it to the mortgagee in payment of his debt, which promise the mortgagee is equitably entitled to lay hold of and enforce under the equity of the statute referred to. (2 Sandf. Ch. R. 480.) It is obvious, that the judgment of the Supreme Court in the present case, cannot be sustained upon the doctrine referred to. The plaintiff does not ask to foreclose the mortgage and does not make the principal debtor Bullard, a party. If the judgment can be supported at all, it must be upon the broad principle that if one person make a promise to another, for the benefit of a third person, that third person may maintain an action on the promise. Upon that question there has been a good deal of conflict of judicial opinion. As long ago as 1817, Chancellor Kent, laid it down as a point decided, and referred to not less than eight English and American cases, as sustaining the principle. (Cumberland v. Codrington, 3 J. C. R. 255); and since then it has been frequently affirmed by judges, after an attentive examination of cases, as

pany (1 Exch. D. 20, 88), where is was held that articles of association do not constitute a contract between the company and an outsider. A provision in an act of Parliament may enable an outsider to sue. There is in such cases a statutory obligation of which the person named can take the benefit—an action for debt on a statute being a well known old form of action at Common Law; but an agreement between A. and B. that B. shall pay C., gives C. no right of action against B. I cannot see that there is in such a case any difference between Equity and Common Law, it is a mere question of contract."

in Barber v. Bucklin (2 Denio 45), and in the cases therein referred to. These cases, and also those referred to by Chancellor Kent, are doubtless subject to some of the criticisms which have since been applied to them. Some of the opinions were pure *obiter dicta,* and in others, the cases though presenting the point were decided upon other grounds. It cannot however be denied, that the doctrine had been so often asserted, that it had become the prevailing opinion of the profession, that an action would lie in such a case in the name of the creditor, for whose benefit the promise was made.[8] Finally the question came squarely before this court in Lawrence v. Fox (20 N. Y. 268), and we held, with hesitation on a part of the portion of the judges who concurred, while others dissented, that the action would lie. We must therefore regard the point as definitely settled, so far as the courts of this State are concerned.

The judgment appealed from being in accordance with the law as adjudged in that case, must be affirmed.

SCHAEFER v. HENKEL.

Court of Appeals of New York, 1878. 75 N. Y. 378.

Appeal from judgment of the General Term of the Court of Common Pleas, affirming a judgment in favor of defendant, entered upon an order dismissing complaint on trial.

This action was upon a lease under seal of certain premises in New York, which lease was executed by "J. Romaine Brown, agent," as lessor and by defendant as lessee.

The facts appear sufficiently in the opinion.

MILLER, J.[9] The plaintiffs were not parties to the lease upon which the action was brought. It was not signed by them. Their names did not appear in it, and there was nothing in the lease to show that they had anything to do with or any interest

8 The same problem frequently arises where the mortgagor has insured, loss payable to the mortgagee. That the mortgagee may sue on the policy, see Cone v. Ins. Co., 60 N. Y. 619; Palmer Sav. Bk. v. Ins. Co., 166 Mass. 189; Ins. Co. v. Olcott, 97 Ill. 439 (where the mortgagor was bound to insure for benefit of the mortgagee.) For the view that such a loss clause did not make the contract one for the benefit of the mortgagee, see Williamson v. Ins. Co., 86 Wis. 393.

9 Part of the opinion omitted.

in the demised premises or the execution of the lease, or that it was executed in their behalf. It was made by one Brown, as lessor, who is described therein, and who signed it, as agent; but it is not stated in the lease for whom he acted. The covenants are all between "J. Romaine Brown, agent, the party of the first part," and the defendant, as party of the second part; and it is not made to appear that the defendant had any knowledge or intimation whatever that Brown was acting on behalf of the plaintiffs or for their benefit. For whom Brown was agent was not made known to the defendant, and it only appears by parol proof upon the trial that Brown was authorized orally by the plaintiffs to make a demise of the premises described in the lease. The signature of Brown is as agent, and his seal is attached to the instrument, and the same is also signed and sealed by the defendant. The plaintiffs, without any assignment of Brown's interest under the lease, bring this action to recover the rent unpaid, upon the ground that Brown merely acted as their agent by their authority, and that they are the actual parties in interest. The question to be determined is whether the actual owners of the lease, which is in the nature of a deed *inter partes*, which was not and does not on its face show that it was executed by them, but which does show an execution by a third person, claiming to act as agent without disclosing the name of his principal, and which contains covenants between the parties actually signing and sealing the same, can maintain an action upon it for the rent reserved therein, even although the person who executed the same, describing himself "agent and party of the first part," had oral authority to enter into the contract, and acted as the owner's agent in the transaction. The rule seems to be quite well established, that in general an action upon a sealed instrument of this description must be brought by and in the name of a person who is a party to such instrument, and that a third person or a stranger to the instrument cannot maintain an action upon the same. The question presented has been the subject of frequent consideration in the courts, and I think it is established in this State that where it distinctly appears from the instrument executed that the seal affixed is the seal of the person subscribing, who designates himself as agent, and not the seal of the principal, that the former only is the real party who can maintain an action on the same. He alone enters into the covenants and is liable for any failure to fulfill, and he only

can prosecute the other party. He is named in the indenture as a party, and an action will not lie on behalf of or against any person who is not a party to the instrument, or who does not lawfully represent or occupy the place of such party. It is unnecessary to review all the decisions bearing upon the question, as in a very recent case the principle discussed has been considered by this court, and the whole subject, as well as the decisions relating to the same, deliberately and carefully reviewed. See Briggs v. Partridge (64 N. Y. 357). * * *

It is also urged that the plaintiffs can maintain the action under the Code (§ 111) as the real parties in interest. One great object of this provision was, to enable an assignee of a chose in action to sue in his own name; and it would be placing a construction upon this provision which is I think unwarranted, to hold that a sealed[10] instrument executed by parties belongs to another, without any transfer whatever by a party named therein. The parties whose signatures and seals are affixed to such an instrument, and who alone are named therein, are the real parties in interest, for they only are bound thereby. No right therefore exists in a stranger as against one of them,

[10] Compare Rogers v. Gosnel, 51 Mo. 466, (1873) where a real estate agent, who had negotiated a sale of land, was allowed to sue on the provision of a sealed contract between the seller and the purchaser, binding the latter to pay the agent's commission. This result was reached on the following reasoning by Adams, J.:

"I see no good reason for keeping up this sort of distinction between contracts under seal and not under seal. If the covenant is made for the benefit of a third person, why is he not a party to it so as to maintain an action in his own name?

The party in whose name a contract is made for the benefit of another, is declared by our practice act to be a trustee of an express trust and such trustee may sue in his own name. (Harney v. Dutcher, 15 Mo., 89; Miles v. Davis, 19 Mo., 408; 2 W. S., 1000, 3).

It does not follow that because the trustee is allowed to sue in his own name on such a contract, that the beneficiary is precluded from doing so. A recovery by either would be a bar to another action, whether bought by the trustee or beneficiary.

In some classes of trusts, the trustee alone can sue at law but this is not one of that character.

The courts have repeatedly held, that a person for whose benefit a contract is made may sue in his own name, when it appears on the face of the contract that he is a beneficiary. This was the law before our code of practice was adopted, and the code allowing a trustee to sue has not altered this rule."

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until there is an assignment of the interest of such party. It is enough to say that the plaintiffs were not lawfully entitled to the rent, under the lease, or the defendant bound to pay them therefor, until a transfer[1] of the lessor's interest, or until some recognition of the plaintiffs' title thereto by the defendant, which does not appear to have been made. For anything which appears, another suit may have been brought by Brown to recover the very same rent, and it is not clear what valid defense could be interposed to such an action. * * *

Judgment affirmed.

WATERMAN v. C., M. & ST. PAUL RAILROAD CO.

Supreme Court of Wisconsin, 1884. 61 Wis. 464.

On or about February 2, 1880, in consideration of $90 then paid, the defendant, at Darien, Wisconsin, agreed with the plaintiff in writing to transfer one carload of goods consisting of household goods, farming implements, one pair of horses, and some lumber, described therein as the property of the plaintiff, from said Darien to Plum Creek, in the state of Nebraska. The writing recited that the property was received of the plaintiff at the former place and consigned to him at the latter place. As a part of the contract the plaintiff therein released the defend-

[1] See also Hartford Ore Co. v. Miller, 41 Conn. 112, (1874), where land was purchased by an individual for a syndicate which was later incorporated; the grantee conveyed to the corporation which brought an action in its own name against the original grantor for a breach of the covenant of seisin; it was held that it could not sue as the "assignee and equitable owner" under the Connecticut Code, but the action must be brought by the first grantee.

Where the contract is not under seal, the agent, in whose name it was made may sue whether the agency is disclosed on the face of the instrument or not; Taudry v. Walsch, 154 Cal. 108, (1908); Snyder v. Exp. Co., 77 Mo. 523, (1883); Stoll v. Sheldon, 13 Neb. 207, (1882); Considerant v. Brisbane 22 N. Y. 389, (1860); Indiana v. Gillespie, 105 N. Y. 653, (1887); Albany v. Lundberg, 121 U. S. 451, (1887); Beardsley v. Schmidt, 120 Wis. 405, (1904).

Contra: That in case of a simple contract the action must be brought in the name of the principal, Martin v. Mask, 158 N. C. 436, (1912), 41 L. R. A. (N. S.) 641, annotated.

ant from certain liabilities, and was to and did accompany the property; and for that purpose was to and did receive a free pass from the defendant. When the car reached Plum Creek, the railroad company having the same in charge refused to deliver the property to the plaintiff unless he would pay an extra charge of $32.28 over and above that already paid, as expressed in the contract, as freight, and in compliance with that exaction the same was then and there paid, and the property delivered to the plaintiff, and this action is to recover back the amount of such excessive charges so exacted and paid. It appears as a matter of fact, that the property belonged to Charles Nowlan; that the negotiations for the carriage were conducted by his brother, O. F. Nowlan; that the agreed freight ($90) was paid by Cheesbro, the father-in-law of Charles Nowlan; that at the time of the loading of the car Cheesbro started to sign the contract in behalf of Charles Nowlan, when the defendant stopped him, and insisted that as the plaintiff was to accompany the goods and receive them at Plum Creek, he should execute the contract, which he accordingly did, and that recited that $90 was received of Cheesbro for the plaintiff. It further appears that the amount of the extra charge exacted at Plum Creek was, in fact, furnished and paid by Charles Nowlan in the presence and with the consent of the plaintiff. The answer consists of a general denial merely. Upon the trial the jury found for the plaintiff, and assessed his damages at the amount of such excessive charges and interest, and from the judgment entered thereon this appeal is brought.

Cassoday, J. Notwithstanding the plaintiff is described in the contract of carriage as consignor, consignee, and sole owner, yet the defendant seeks to escape liability for the repayment of the excessive exaction on the sole ground that the plaintiff was not the owner of the property, and did not personally furnish and pay the overcharge. Is such a defense available? The question has elicited much discussion, and the adjudicated cases upon it present a considerable disagreement. We make no attempt to reconcile an irreconcilable conflict. It is enough to know that our conviction as to the law applicable has the sanction of respectable authority, and especially under our statute as it has been construed by this court. The question is not whether the owner could have maintained the action, for he did not bring the action. There seems to be no dispute that, where there is

nothing appearing to the contrary, the consignee is presumed to be the owner of the property, and as such may maintain an action for its loss or depreciation in value by reason of the negligence of the carrier. Undoubtedly this presumption may be overcome by evidence. A consignor may have a right of action against the carrier by reason of ownership. So he may have such right of action on privity of contract. The contract seems to be controlling, at least to a certain extent, in all cases. Evans v. Marlett, 1 Ld. Raym. 271; Davis v. James, 5 Burr. 2680; Mason v. Lickbarrow, 1 H. Bl. 357; Moore v. Wilson, 1 Term. R. 659; Joseph v. Knox, 3 Camp. 320; Dunlap v. Lambert, 6 Clark & F. 600; Freeman v. Birch, 3 Q. B. 492; Blanchard v. Page, 8 Gray, 281; Finn v. R. R. Co., 112 Mass. 524; Carter v. Graves, 9 Yerg. 446; Northern Line Packet Co. v. Shearer, 61 Ill. 263; Southern Exp. Co. v. Craft, 49 Miss. 480. A careful analysis of these cases will be found in a well written article by Judge Pierce, of Tennessee, in 7 South. Law Rev. (N. S.) 255-283.

It appears that much depends upon the nature of the act complained of and the character of the action. Thus, in Carter v. Graves, *supra,* it was said—"that, in all actions on the case against a carrier for a loss or injury done to property, the wrong is the gist of the action, and the contract to deliver collateral to it. In all actions of *assumpsit* for not delivering according to contract, the contract to deliver is the gist of the action, and the loss or injury sustained is collateral thereto." In several of the cases above cited, an action for the breach of the contract was maintained by a party to the contract having no ownership or interest in the property carried. Thus, in Joseph v. Knox, *supra,* the plaintiffs had no ownership nor interest in the goods, but, as shippers, were parties to the contract, and it was held that they might maintain the action upon the bill of lading for the failure to deliver and carry. Lord Chief Justice Ellenborough observed that, "there is a privity of contract established between these parties by means of the bill of lading. That states that the goods were shipped by the plaintiffs, and that the freight for them was paid by the plaintiffs in London. To the plaintiffs, therefore, from whom the consideration moves, and to whom the promise is made, the defendant is liable for the non-delivery of the goods. After such a bill of lading has been signed by his (the carrier's) agent, he cannot say to the

shippers that they have no interest in the goods, and are not damnified by his breach of contract. I think the plaintiffs are entitled to recover the value of the goods, and they will hold the sum recovered as trustees for the real owner."

So in Hooper v. Railway Co., 27 Wis. 91, it was said that "the shipper is a party in interest to the contract, and it does not lie with the carrier who made the contract with him to say, upon a breach of it, that he is not entitled to recover the damages unless it be shown that the consignee objects; for without that it will be presumed that the action was commenced and is prosecuted with the knowledge and consent of the consignee, and for his benefit. The consignor or shipper is, by operation of the rule, regarded as a trustee of an express trust, like a factor or other mercantile agent who contracts in his own name on behalf of his principal." Here the defendant contracted solely with the plaintiff. In the contract, the defendant, with full knowledge of the facts, recognized the plaintiff as the sole owner of the property. The freight had been fully paid in behalf of the plaintiff. To him, the defendant, in consideration of such payment, expressly agreed to deliver the property at the place of consignment. This express agreement was broken by the refusal to so deliver, except upon condition of the further payment of the unauthorized exaction. This unauthorized exaction was complied with when the delivery was made. Having broken the contract, and received the overcharge in consequence of the breach, the defendant seeks to escape liability for the breach on the ground that the only party with whom it contracted was not in fact the owner of the property, and did not personally furnish and pay the overcharge exacted as a condition of the delivery. To hold such a defense available would, in effect, abrogate an express written contract. One exception to the statutory rule that "every action must be prosecuted in the name of the real party in interest" (section 2605), is that "a trustee of an express trust * * * may sue without joining with him the person for whose benefit the action is prosecuted." Section 2607. "A trustee of an express trust, within the meaning of this section," must "be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." Id. By amendment these provisions have been made applicable to actions brought in justice courts, as this was. Subdivision 27, § 2, c. 194, Laws 1879. If the consignor or shipper

could properly be "regarded as trustee of an express trust," under this statute, as held in Hooper v. R. R. Co., *supra,* then certainly the person described in the contract as consignor, consignee, and sole owner, and for whom the freight has been paid, must also be regarded as a trustee of an express trust under the statute. Allen v. Kennedy, 49 Wis. 549 (S. C. 5 N. W. Rep. 906.)[2]

Judgment affirmed.

RICHARDSON v. MEANS.

Supreme Court of Missouri, 1856. 22 Mo. 495.

This was an action commenced June 17, 1853, by Maria L. Richardson (the husband having afterwards been made a party by an amended petition) for the recovery of a female slave and her two children, alleged in the petition to have been wrongfully taken by the defendant, May 1, 1849, and unlawfully detained by him.

Defendant, in his answer, denied the title of the plaintiff, and claimed title in himself, and relied upon a bill of sale to himself, dated May 1, 1848, of the negress and one child, executed by Thomas R. Richardson, husband of plaintiff, Maria, and co-plaintiff in this action.

To sustain the wife's right, she relied on a deed of gift from her father, William C. Bruce, dated April 1, 1845, by which, in consideration of love and affection toward the plaintiff, his daughter, he conveyed the female slave in controversy to one Littleton Jozner, "upon trust, that the said Jozner, his executors, etc., shall permit my said daughter to hold possession of and take the use, hire and profits of the said Maria and her increase to her sole and separate use during her life, independent of her said husband; and at the death of my said daughter, the said Maria and her increase to be equally divided between her children, etc." * * *

[2] Compare Thompson v. Fargo, 49 N. Y. 188, (1872), where the agent was not permitted to sue a connecting carrier which received the goods and failed to deliver them.

The jury found for the defendant, and judgment was given accordingly. Plaintiffs appealed.

Leonard, J., delivered the opinion of the court.

We cannot reverse this judgment, no matter how much we may regret that parties, by a slip in the form of proceedings, should subject themselves to costs and delay in the judicial enforcement of their rights. The instructions given are correct in point of law, and this seems to be admitted; but the objection is, that the one given by the court upon its own suggestion was not warranted by the evidence in the cause, and that, although correct in the abstract, it had the effect of misleading the jury. If this could be made apparent to us, it might furnish sufficient ground for reversing the judgment in a case where the reversal would avail the party. Here, however, the plaintiffs have stated themselves out of court, and, therefore, if the jury were misled, it resulted in no injury to them; for the reason that, according to their own showing, they had no case entitling them to recovery. The plaintiff's title is derived from the instrument of gift executed by the father, which vests the legal ownership in the trustee for the use of the wife during her life, and upon her death for the use of her children, and the action is to redress a wrong done to the legal ownership, being substantially an action for the conversion of the plaintiff's slaves. Under the old form of proceeding, this suit must have been brought by the trustee at law; but if, from any cause, the legal ownership could not have been made effectual for the protection of the wife's equitable right, the courts would, at her suit, upon a proper statement of facts, all the necessary parties being before them, have administered the appropriate equitable relief. But it is supposed that all this is changed by the new code, which is true to some extent. It must be observed, however, that the code has not changed the rights of parties, but only provided new remedies for their enforcement; it has not abolished the distinction between equitable and legal rights, but the distinction between legal and equitable remedies, so far at least as to provide that one form of suit shall be used for the enforcement of both classes of rights. The case made upon the record was for legal relief; but the case made by the plaintiffs, in proof, was of a different character.

It was the duty of the trustees to protect the legal ownership from violation, and to preserve the property for the use of the

parties beneficially interested as they should respectively become entitled; and if, as before remarked, there were any obstacles in the way of the legal remedy, or the trustee refused to do his duty, then, upon a proper case stated, and the proper parties being made, the courts would, in a civil suit under the code, afford relief according to the principles of equity; and the present judgment cannot be pleaded in bar of any equitable relief that shall be thus sought by the wife.

The judgment must be affirmed.

FELGER v. COWARD.

Supreme Court of California, 1868. 35 Cal. 650.

This was an action of ejectment for the possession of an eighth undivided interest in a mining claim and quartz mill situated in Mariposa County. The complaint was in the usual form, and the answer traversed all of its material averments. It appeared from the evidence at the trial, which was by the Court, without a jury, that the defendant entered into a written agreement with the plaintiff to convey to the latter by sufficient deed said interest in said mining claim and mill, upon the payment to the defendant, at a stipulated time, of the purchase price, for which a promissory note was executed and delivered by plaintiff to the defendant. The evidence further tended to prove that plaintiff had, before suit brought, complied with said agreement on his part, and that the defendant refused to make said conveyance as stipulated, and repudiated said agreement. Prior to the execution of said agreement the plaintiff had been at work in said mine in the employ of the defendant and others of its owners, and after said agreement, and until a short time before the commencement of this suit, the plaintiff continued at work in said mine, receiving wages for his labor, and the dividends therefrom proportionate to said interest therein, of which, according to said agreement, he was to become the purchaser.

Judgment passed for the plaintiff in the Court below, without any findings of fact being made and filed, and thereupon the defendant moved for a new trial, on the ground that the judgment was against the evidence and against the law. The motion was denied, and the defendant appealed from the judg-

ment and from the order denying said motion for a new trial.

By the Court, SANDERSON, J.:

In Patterson v. The Keystone Mining Co., 30 Cal. 360, our attention was called to the statute of the 13th of April, 1860 (Stats. 1860, p. 175), in relation to the conveyance of gold mining claims, and we considered, *arguendo,* that it had abrogated the rule announced in the case of the Table Mountain Tunnel Co. v. Stranahan, 20 Cal. 198, to the effect that title to a mining claim would pass by a verbal sale, if accompanied by a transfer of the possession. In the subsequent case of Goller v. Fett, 30 Cal. 484, the effect of the statute came up for further consideration, and its construction became indispensable to the final disposition of that case, and the effect suggested in Patterson v. Keystone Mining Co. was formally declared to be the effect of the statute, and that title to gold mining claims could be passed only by an instrument in writing. (See also King v. Randlett, 33 Cal. 318.)

The rule established in Goller v. Fett seems to be conclusive of the present case. It is an ordinary action of ejectment, and the plaintiff, at least, showed only a contract by the defendant to convey. His remedy was for specific performance, and, as incidental to that, delivery of the possession.[3]

Order denying a new trial reversed and new trial granted.

[3] For the general rule that an equitable title will not support ejectment, see Peck v. Newton, 46 Barb. 175, (N. Y. 1863); Eaton v. Smith, 19 Wis. 537, (1865). Under some statutes an "equitable" title is sufficient to support a possessory action, Johanson v. Washington, 190 U. S. 179, (1903).

See also Rose v. Hayden, 35 Kan. 106, (1886), where the plaintiff recovered in ejectment on the ground that the defendant had taken a deed to the land in his own name in violation of his duty to the plaintiff. It was said in this case that under the Kansas statute ejectment was an equitable as well as a legal remedy. If this means that in an action triable by jury a plaintiff may recover on the basis of a constructive or resulting trust, the innovation may lead to many practical difficulties, because a jury is poorly equipped to exercise some of the delicate functions of a chancellor in dealing with restitution, reformation and rescission.

WHEELER v. ALLEN.

Court of Appeals of New York, 1872. 51 N. Y. 37.

Appeal from the order of the General Term of the Supreme Court in the first judicial district, reversing a judgment in favor of plaintiff entered on a verdict, and directing a new trial.

The action was brought to recover the possession of personal property.

The complaint alleged that the defendant had become possessed of and wrongfully detained from the plaintiff the following goods and chattels of the plaintiff, that is to say: Securities (partially written and partially printed), known as scrip of the Great Western Insurance Company, in and of the city of New York, issued by the said company, a portion thereof in 1864 of the value of $1,310, and the residue in 1865 of the value of $4,880; and the plaintiff thereupon demanded judgment that the "defendant deliver to the plaintiff the said goods and chattels," and pay the plaintiff damages for the detention thereof.

The defendant, by his answer, denied each allegation of the complaint.

After the plaintiff rested his case the defendant moved for the dismissal of the complaint on several grounds, which, with the facts in the case, so far as they are material to the decision in this court, sufficiently appear in the opinion of the chief commissioner.

EARL, C.[4] The plaintiff in this action of replevin claimed to receive scrip of the Great Western Insurance Company to the amount of $1,310, which was issued in the year 1864, and scrip in the same company for $3,570, issued in the year 1865, and he recovered upon the trial for both scrips.

There are two grounds upon which I hold this recovery was erroneous.

1. As to the scrip of 1865, it seems undisputed that the defendant never purchased any for the plaintiff. He was directed to take the plaintiff's money, which was in his hands, and invest it in the scrip of that year. But he did not do so, but used the money for other purposes. It is true, however, that he gave plaintiff a certificate June 2, 1865, stating that he had invested

[4] Concurring opinion of Lott, Ch. C. omitted.

this money in such scrip, but this certificate was untrue. While it may be true that an action of replevin may be maintained to recover property which the defendant has had in his possession but has wrongfully disposed of, I know of no authority or principle which will authorize a recovery in such an action for property of which the defendant never has had the possession.

2. It seems to be undisputed that the scrip for the $1,310, was issued to the defendant and stood in his name. Hence, he had the legal title to the same. In law he held the same as trustee for the plaintiff, and as such trustee he could be compelled to account to the plaintiff in an action of equity. But an action of replevin to recover the scrip under such circumstances is a great novelty. The legal title was never vested in the plaintiff, and his only remedy to procure this scrip was by an action in equity.[5]

The order of the general term should be affirmed and judgment absolute rendered against the plaintiff for costs.

Order affirmed.

WESTERN RAILWAY CO. v. NOLAN.

Court of Appeals of New York, 1872. 48 N. Y. 513.

The City of Albany had issued a large amount of bonds in aid of certain railroad construction, under a contract with the plaintiff and the West Stockbridge Railroad Co.; this contract provided that the plaintiff should provide a sinking fund to be held by three trustees for the purpose of retiring these bonds at maturity. Under this arrangement the trustees held a fund of some nine hundred thousand dollars, which the assessors of Albany were attempting to assess for local taxation.

The plaintiffs began this action to restrain such assessment as unauthorized and illegal.

[5] See also Johanneson v. Borchenius, 35 Wis. 131, (1874), where the plaintiff on the basis of an equitable right to a land certificate sought to maintain an action for conversion against the defendant to whom the certificate had been issued.

The court dismissed the complaint and the plaintiff appealed.[6]

LEONARD, C. While the plaintiff has an important interest in the sinking fund, it is not under its control or management, nor is the title to it vested in it. It has such an interest as would enable it to compel an accounting by the trustees, or maintain an action against them for the correction of an abuse of the fund. The plaintiff has agreed to indemnify the city of Albany from injury by losses to the fund, and is thereby indirectly bound to maintain it, or to pay the bonds, amounting to $1,000,000, with the interest; and the plaintiff is also entitled to the amount of the trust funds remaining, after the said bonds, with the interest, have been satisfied or paid. Perhaps it might maintain an action against third parties for the protection or defense of the fund, in case the trustees should, on request, refuse to institute the proper action or proceedings for that purpose. The plaintiff should be regarded as a *cestui qui trust,* and interested in the said fund. The trustees are the parties in whom the fund is vested and whose duty it is to maintain and defend it against wrongful attack or injury tending to impair its safety or amount. The title to the fund being in them, neither the *cestuis qui trust* nor the beneficiaries[7] can maintain an action in relation to it, as against third parties, except in case the trustees refuse to perform their duty in that respect, and then the trustees should be brought before the court as parties defendant. There is nothing in the case proving any refusal or reluctance on the part of the trustees to perform any duty which they ought to assume in vindicating the fund from illegal assessment or taxation. The plaintiff has not, for these reasons made any case entitling it to bring this action.

There are other technical objections to this action which are insurmountable. * * *

Judgment affirmed.

6 Statement condensed and part of the opinion omitted.

7 But see First Baptist Church v. Branham, 90 Cal. 22, (1891), where the church corporation was allowed to bring an action to quiet the title to certain church property held by trustees for it.

McCOMAS v. COVENANT MUTUAL LIFE INS. CO.

Supreme Court of Missouri, 1874. 56 Mo. 573.

ADAMS, JUDGE, delivered the opinion of the court.

This was an action on a life policy issued by the defendant on the 29th day of October, 1862, insuring the life of Harry G. McComas, husband of the plaintiff, in the sum of five thousand dollars. The consideration on the face of the policy, and by reference to a statement on the margin, is expressed to be paid for the use and benefit of the plaintiff, the wife of the assured.

The policy was issued to the husband, and the covenant is to pay to him, his executors, administrators or assigns, in sixty days after due notice and proof of death, the sum assured, the balance of the year's premium, if any, being first deducted therefrom together with all indebtedness of the party to the company.

The annual premium to be paid was one hundred and eighty-nine dollars—ninety-five dollars of which, was to be paid in money in two equal installments of $47.50, and ninety-four dollars in annual notes. The husband died on the 3rd day of June, 1871, leaving the last six annual premium notes unpaid.

This suit was commenced on the ninth day of December, 1871, by the plaintiff as beneficiary under this policy, for the amount assured. The defendant filed a demurrer to the petition upon the ground that the plaintiff could not sue as beneficiary on this policy. This demurrer was overruled, and the same point was afterwards raised by motion in arrest and saved by an exception to the action of the court in overruling the motion. * * *

First—The first point relied on by the defendant is, that this action cannot be maintained by the plaintiff on the policy of insurance, because by the terms of the policy the sum assured was to be paid to the deceased or his executors, administrators or assigns. This objection was raised by motion in arrest, and also on the trial by objection to the admissibility of the policy of insurance as evidence. It is manifest, from the recital in the policy in regard to the consideration to be paid as premium, that this insurance was effected by the husband for the sole benefit of his wife. The husband, therefore, was constituted a trustee for his wife. He became a trustee of an express trust and his wife was the beneficiary. Our statute allows a trustee

of an express trust to sue in his own name without joining with him the person for whose benefit the writ is prosecuted. (2 Wagn. Stat. 1000, sec. 3.) But this statute does not preclude the beneficiary under a contract like this from prosecuting a suit without joining the trustee. This contract on its face was made for the benefit of the wife alone, and she is, therefore, the real party in interest and had the right to bring this suit. A recovery by her would be a bar to another action by the trustee. In Rogers & Peck v. Gosnell (51 Mo. 466) it was held, that either the trustee or beneficiary of a contract might sue, and a recovery by either would be a bar to another action. (Miles v. Davis, 19 Mo. 408; Harney v. Dutcher, 15 Mo. 89; Van Schaick v. R. R., 38 N. Y. 346; Record v. Sanderson, 2 How. 179; Carter v. The Mayor of Albany, 43 N. Y. 399; Lawrence v. Fox, 20 N. Y. 268.)[8]

Judgment affirmed.

SECTION 2. JOINDER OF PARTIES.

CODE OF CIVIL PROCEDURE OF NEW YORK.

§ 446.[1] "All persons having an interest in the subject of the

[8] That the personal representatives of the insured could have maintained the action, see Torrinfield v. Mass. Nat'l Life Ins. Co., 47 N. Y. 430, (1872).

Compare Kimball, Admr. v. Gilman, 60 N. H. 54, (1880), where the administrator of the insured had collected the amount of a similar policy, and the beneficiary was allowed to recover it from him by indebitatus assumpsit for money had and received.

[1] This section appears verbatim or in substance in nearly all of the Codes: For the exact wording see: Alaska, Code Civ. Proc. 1900, § 38; Arizona, apparently no corresponding section; Arkansas, Dig. Stat. 1921, § 1095; California, Code Civ. Proc., 1915, § 378; Connecticut, Gen. Stat., 1918, § 5640; Idaho, Comp. Stat., 1919, § 6645; Indiana, Burn's Ann. Stat. 1914, § 263; Iowa, Comp. Code, 1919, § 7085; Kansas, Gen. Stat., 1915, § 6924; Kentucky, Rev. Code, 1900, § 22; Minnesota, apparently no corresponding section; Missouri, R. S. 1919, § 1157; Montana, Rev. Code, 1907, § 6487; Nebraska, Ann. Stat., 1911, § 1036; Nevada, Rev. Laws, 1912, § 4998; New Mexico, Ann. Stat. 1915, § 4071; New York, Civ. Prac. Act. 1920, § 209:

"All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of

action, and in obtaining the judgment demanded, may be joined as plaintiffs, except as otherwise expressly prescribed in this act."

§ 447.[2] "Any person may be made a defendant who has or

or arising out of the same transaction or series of transactions is alleged to exist whether jointly, severally or in the alternative, where if such persons brought separate actions any common question of law or fact would arise; provided that if upon the application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court may order separate trials or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled." (This provision was taken from the present English Rules, Order XXI, Rule 1, for a construction of which, see Drinebrier v. Wood, L. R. Ch. D. (1898) 1, 393.) North Carolina, Consol. Stat., 1919, § 455; North Dakota, Comp. Laws, 1913, § 7403; Ohio, Gen Code, 1921, § 11254; Oklahoma, Rev. Laws, 1910, § 4690; Oregon, apparently no corresponding section; South Carolina, Code, 1912, § 166; South Dakota, Rev. Code, 1919, § 2313; Utah, Comp. Laws, 1907, § 2913; Washington, Rem. & Bal. Code, 1910, § 189, 190; Wisconsin, Stat., 1919, § 2602; Wyoming, Comp. Stat., 1920, § 5592; United States, Equity Rules, 1912.

Rule 37. "Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join, he may for such reason be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

Rule 38. "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

[2] This section appears in substantially the same form in nearly all the Codes. For the exact wording, see:

Alaska, Code Civ. Proc. 1900, § 38; Arizona, apparently no corresponding section; Arkansas, Dig. Stat., 1921, § 1096; California,

claims an interest in the controversy adverse to the plaintiff, or who is a necessary party defendant, for the complete determination or settlement of a question involved therein, except as otherwise expressly prescribed in this act."

§ 448.[3] "Of the parties to the action, those who are united

Code Civ. Proc., 1915, § 379; Connecticut, Gen, Stat., 1918, § 5641; Idaho, Comp. Stat., 1919, § 6646; Indiana, Burn's Ann. Stat., 1914, § 269; Iowa, Comp. Code, 1919, § 7087; Kansas, Gen. Stat., 1915, § 6925; Kentucky, Rev. Code, 1900, § 23; Minnesota, apparently no corresponding section; Missouri, R. S. 1919, § 1158; Montana, Rev. Code, 1907, § 6488; Nebraska, Ann. Stat., 1911, § 1037; Nevada, Rev. Laws, 1912, § 4999; New Mexico, Comp. Stat., 1915, § 4072; New York, Civ. Prac. Act., 1920:

§ 211. "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative; and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities."

§ 212. "It shall not be necessary that each defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the court may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest."

§ 213. "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to the extent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between the parties."

North Carolina, Consol. Stat., 1919, § 456; North Dakota, Comp. Laws, 1913, § 7404; Ohio, Gen. Code, 1921, § 11255; Oklahoma, Rev. Laws, 1910, § 4691; Oregon, apparently no corresponding section; South Carolina, Code, 1912, § 167; South Dakota, Rev. Code, 1919, § 2314; Utah, Comp. Laws, 1907, § 2914; Washington, Rem. & Bal. Code, 1910, § 189; Wisconsin, Stat., 1919, § 2603; Wyoming, Comp. Stat., 1920, § 5593; United States, Equity Rule 37, ante p. 167.

[3] This section appears in substantially the same form in nearly all of the Codes. For the exact wording, see:

Alaska, Code Civ. Proc., 1900, § 39; Arizona, Rev. Stat., 1913, § 416; Arkansas, Dig. Stat., 1921, § 1097; California, Code Civ. Proc., 1915, § 382; Connecticut, apparently no corresponding section; Idaho, Comp. Stat., 1919, § 6649; Indiana, Burn's Ann. Stat., 1914, § 270; Iowa, Comp. Code, 1919, § 7088, 7089; Kansas, Gen. Stat., 1915, § 6926, 6927; Kentucky, Rev. Code, 1900, § 24, 25; Minnesota, no corresponding section; Missouri, R. S., 1919, § 1159; Montana, Rev. Code, 1907, § 6491; Nebraska, Ann. Stat., 1911, § 1038, 1039; Nevada, Rev. Laws, 1912, § 5001; New Mexico, Ann. Stat., 1915, § 4073, 4079; New York, Civ. Prac. Act, 1920, §§ 194, 195; North Carolina, Consol, Stat., 1919, § 457; North

in interest must be joined as plaintiffs or defendants, except as otherwise expressly prescribed in this act. But if the consent of any one, who ought to be joined as a plaintiff, cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint. And where the question is one of a common or general interest of many persons, or where the persons, who might be made parties, are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

§ 454.[4] Two or more persons severally liable upon the same written instrument, including the parties to a bill of exchange or a promissory note, whether the action is brought upon the instrument, or by a party thereto to recover against other parties liable over to him; may, all or any of them, be included as defendants in the same action, at the option of the plaintiff.

Dakota, Comp. Laws, 1913, § 7406; Ohio, Gen. Code, 1921, §§ 11256, 11257; Oklahoma, Rev. Laws, 1910, §§ 4692, 4693; Oregon, no corresponding section; South Carolina, Code, 1912, § 168; South Dakota, Rev. Code, 1919, § 2215; Utah, Comp. Laws, 1907, § 2917; Washington, Rem. & Bal. Code, 1910, § 189; Wisconsin, Stat., 1919, § 2604; Wyoming, Comp. Stat., 1920, §§ 5594, 5595; United States, Equity Rules, 37, 38 ante p. 167.

[4] The corresponding section in a number of the codes varies substantially from the New York provision. See:

Alaska, Code Civ. Proc., 1900, § 34; Arizona, R. S., 1913, § 407; Arkansas, Dig. Stat., 1921, § 1099; California, Code, Civ. Proc., 1915, § 383; Connecticut, no corresponding section; Idaho, Comp. Stat., 1919, § 6650; Indiana, Burn's Ann. Stat., 1914, § 271; Iowa, Comp. Code, 1919, § 7090; Kansas, Gen. Stat., 1915, § 6928; Kentucky, Rev. Code, 1900, § 26; Minnesota, Gen. Stat., 1913, § 7683; Missouri, R. S., 1919, § 1160; Montana, Rev. Code, 1907, § 6492; Nebraska, Ann. Stat., 1911, § 1040; Nevada, Rev. Laws, 1912, § 5002; New Mexico, Ann. Stat., 1915, § 4076; New York, Civ. Prac. Act., 1920, § 216; North Carolina, Consol. Stat., 1919, § 458; North Dakota, Comp. Laws, 1913, § 7407; Ohio, Gen. Code, 1921, § 11258; Oklahoma, Rev. Laws, 1910, § 4694; Oregon, Comp. Laws, 1920, § 37; South Carolina, Code, 1912, § 169; South Dakota, Rev. Code, 1919, § 2316; Utah, Comp. Laws, 1907, § 2918; Washington, Rem. & Bal. Code, 1910, § 192; Wisconsin, Stat., 1919, § 2609, 2609a; Wyoming, Comp. Stat., 1920, § 5596. United States, Equity Rules, 1912, Rule 42: "In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable."

I. *Plaintiffs.*

DEWEY v. CAREY.

Supreme Court of Missouri, 1875. 60 Mo. 234.

WAGNER, JUDGE, delivered the opinion of the court.

The petition alleges that defendant instituted a suit by injunction against Thomas D. Price, Leroy D. Dewey and the plaintiff, and that upon executing a bond to them a temporary injunction was granted; that upon a hearing of the cause the injunction was dissolved and the petition dismissed; but no assessment of damages was had at the time of the dissolution. This action is now instituted by the plaintiff alone on the bond to recover damages for alleged breaches.

A demurrer[5] was sustained to the petition because the other obligees in the bond were not made plaintiffs.

Where an obligation is executed to two or more jointly, all[6] the obligees must sue upon it. They cannot separate the liability and bring an action in favor of each. If the plaintiff can maintain this suit, then Leroy D. Dewey can maintain one, and Thomas D. Price still another, and thus the defendant will be harassed by three suits on the same obligation which was jointly made to the three persons. By our law[7] all contracts are joint and several and a party may sue any one or more debtors against whom he has a demand. But the principle has no application to the obligees in a contract, who must sue jointly as

5 "The defendant may demur to the complaint, where one or more of the following objections thereto appear upon the face thereof: * * * (5) that there is a misjoinder of parties plaintiff, (6) that there is a defect of parties, plaintiff or defendant. (7) That causes of action have been improperly united." * * * N. Y. Code Civ. Proc. § 488.

"Where any of the matters enumerated in section four hundred and eighty-eight of this act as grounds of demurrer, do not appear on the face of the complaint the objection may be taken by answer. N. Y. Code Civ. Proc., § 498.

6 If a necessary plaintiff should refuse to join, the statute permits him to be made a defendant, Rizer v. Gilpatrick, 16 Kan. 564, (1876). Formerly the Supreme Court of Missouri refused to apply this rule to legal actions, Ryan v. Riddle, 76 Mo. 521, (1883), but the section was later amended so as to include actions at law, Mo. R. S. 1919, § 1158.

7 Wagner's Statutes, 1872, Ch. 34, § 1.

plaintiffs. Where the contract made by the obligor is a joint one, one obligee cannot make it a several obligation by suing alone.[8] (Clark v. Cable, 21 Mo. 223; Robbins v. Ayres, 10 Mo. 538; Wells v. Gaty, 9 Mo. 561.)

To permit one party to sue might result in great injury in a case of this kind. One plaintiff might recover the entire penalty of the bond, yet this would be no bar to another action by a plaintiff who was not a party to the suit; and as there could be no apportionment the party would be made liable for obligations that he never entered into. It is true that it may happen in some instances that one obligee has sustained more damage than some of his co-obligees, but this would present no insuperable objection, as under our practice act I think the judgment might be adjusted so as to secure the respective rights of the parties.

The judgment must be affirmed; the other judges concurring.

DEAN v. ST. PAUL & DULUTH R. R. COMPANY.

Supreme Court of Minnesota, 1893. 53 Minn. 504.

One C. E. Peterson was at work for defendant as brakesman during March, 1892, for which it owed him $50.53. He owed the plaintiff, Michael C. Dean, five dollars for board, and gave him an order upon the Railroad Company for that amount. The Company returned the order to plaintiff, saying it declined to collect claims against its employees. On April 15, 1892, Dean commenced this action against the Railroad Company before William Ginder, a Justice of the Peace of Pine County, to recover the five dollars, and on May 12, 1892, he obtained judgment. Defendant appealed to the District Court on questions

[8] Where the plaintiff sues alone on a demand in favor of himself and another jointly, and the defect does not appear on the face of the complaint, it seems that the objection must be taken by answer in the nature of a plea in abatement, Patchin v. Peck, 38 N. Y. 39, (1868); Davis v. Chouteau, 32 Minn. 548, (1884), post.

At common law the objection in such a case might be taken under the general issue on the ground of variance, Hill v. Tucker, 1 Taunt, 7, (1807).

of law alone. There the judgment of the Justice was affirmed, the Judge saying: "I think it must be held in this state, and that it ought to be held everywhere, that an assignee of a part of an entire demand may maintain an action upon it. See Canty v. Latterner, 31 Minn. 239; Risley v. Phenix Bank, 83 N. Y. 318." Defendant appealed to this court.[9]

VANDERBURGH, J. * * * It was determined in Canty v. Latterner, 31 Minn. 242, (17 N. W. Rep. 385), in accordance with the weight of authority, that an assignment of a part interest in a demand or obligation may be made, and that the courts will recognize and protect the equitable interest of the assignee.

But the court did not hold that, as against the debtor or obligor, a separate and independent action might be maintained by the assignee,[10] to recover the amount of his interest, or that a single demand could be split up and enforced in that way by the assignee, severally, so as to subject the debtor to sundry different actions, where he has not consented to the assignment. No such burden can be imposed upon the maker of a single, entire contract. He cannot, against his consent, be compelled to deal with a plurality of creditors, and be subject to be harassed by a multiplicity of suits. The case of Risley v. Phenix Bank, 83 N. Y. 318, does not hold a different doctrine. The court there say: "The tendency of modern decisions is in the direction of more fully protecting the equitable rights of assignees of choses in action, and the objection that to allow an assignment of a part of an entire demand might subject the creditor to several actions has much less force under a system which requires all parties in interest to be joined as parties to the action." There can be but one action upon a single demand. The parties interested must join[1] as plaintiffs, or those not joined must be made defendants, in the action, so that the whole controversy may be determined in one suit, unless the creditor

9 Statement condensed and part of opinion omitted.

10 In Grain v. Aldrich, 35 Cal. 574, (1869), a complaint by a partial assignee was sustained on general demurrer on the ground that the objection for defect of parties must be taken by special demurer. Apparently the same view was taken in Risley v. Bk. 83 N. Y. 318, (1891) Nat'l Ins. Co. v. Ry., 44 Utah 26, (1913).

1 As to the right of the partial assignor to sue alone, see Cable v. Marine Ry. Co. and note, ante p. 127.

agrees to a severance, as by the acceptance of an order, or otherwise. The assignee of a part interest cannot be permitted to carve out of the entire demand the amount of his claim, leaving other parties to bring separate actions for their several interests. See Field v. Mayor of N. Y., 6 N. Y. 179, and National Exch. Bank v. McLoon, 73 Me. 510, where the questions involved herein are fully discussed. The case of bank checks is distinguishable, for manifest reasons. * * *

Judgment reversed.

GOODNIGHT v. GOAR.

Supreme Court of Indiana, 1868. 30 Ind. 418.

FRAZER, J. The appellant and Geo. W. Collier and Levin Cambridge sued the appellees, Eli J. and Benjamin F. Goar, upon the following contract:

"Jefferson Township, Tipton County, Indiana."

"We, the undersigned, citizens of said township, agree and bind ourselves in case either of us is drafted into the service of the United States, to pay our proportionable amount to hire substitutes to fill our places; and this we agree, not only for the present impending draft, but for all other calls that may be made during the present rebellion, unless a majority shall agree to abandon the above arrangement.

Given under our hands this 10th day of February, 1865.

(Signed.)

G. W. COLLIER,
ELI J. GOAR,
BENJAMIN F. GOAR,
WM. H. GOODNIGHT,
LEVIN CAMBRIDGE."

It was alleged in the complaint that all these parties were enrolled in said township and liable to draft then impending; that the plaintiffs and the defendant Benjamin were drafted, and that the defendant Eli was not drafted; that each of the plaintiffs hired and paid a substitute for himself, Collier for fifteen hundred dollars, and Goodnight and Cambridge each for eleven hundred dollars; which several sums were reasonable and

necessary; that the defendant Benjamin, by failing to report himself for duty, avoided military service and the necessity of procuring, and did not procure a substitute for himself; and that neither of the defendants has paid to either of the plaintiffs anything toward defraying the costs of said substitutes; though the same has been demanded.

A demurrer to the complaint, assigning the want of sufficient facts,[2] amongst other causes, was sustained; and this is the only error assigned.

The question argued is, whether the plaintiffs could properly join in the suit; and we have heretofore held, upon full consideration, that, under the code, that question is raised by demurrer for want of sufficient facts. Berkshire v. Schultz, 25 Ind. 523. In that case, we expressed the opinion, that the rule declared in Mann v. Marsh, 35 Barb. 68, that "when two or more plaintiffs unite in bringing a joint action, and the facts stated do not show a joint[3] cause of action in them, a demurrer will lie," was correct and best comported with the spirit of the code.

The code itself is not exactly definite as to who may be joined as plaintiffs. It provides, however, that judgment may be given for or against one or more of several plaintiffs (sec. 368), which was the practice in equity, though it was otherwise at law. It also provides (sec. 17), that all persons having an interest in the subject of the action, and in obtaining the relief demanded, shall[4] be joined as plaintiffs, except in certain cases mentioned in the nineteenth section. Indeed, the code seems to have re-enacted the rules which have prevailed in courts of equity, as to who must join as plaintiffs, and may be joined as defendants. But as to those cases in which, in equity, plaintiffs might or

2 But where, as under the New York Code, misjoinder of plaintiffs is expressly made a cause of demurrer, it would seem that the objection might well be taken on that ground, Berney v. Drexel, 33 Hun. 419; Tenant v. Phister, 51 Cal. 511, (1876).

3 At common law, where the declaration alleged a promise in favor of the plaintiffs jointly, but the proof disclosed a separate promise in favor of each, there was a fatal variance between the contract alleged and the contract proved, Whitmore v. Merrill, 87 Me. 456, (1895).

The rule seems to be the same under the Code, Slaughter v. Davenport, 82 Mo. App. 652, (1896). Pelly v. Boyer, 7 Bush (Ky.) 513, (1870).

4 The Indiana Code provides that persons having an interest, etc. shall be joined instead of "may be joined", as in the other codes.

might not have joined, at their option, the code does not expressly speak, for the reason, probably, that the general rule in equity in relation to parties plaintiff was not founded upon any uniform principle and could not be expounded by any universal theorem as a test. Sto. Eq. Pl. § 539. And it may have been thought safer, therefore, to leave each case to be decided by the courts upon authority and analogy. That it was intended that the rules of pleading in courts of equity should govern the subject is quite evident from those provisions of the code which prescribe the relief which may be granted, and to whom; in this respect conforming in all respects to the established practice of those courts—a mode of administation quite impracticable in a great many cases, unless the parties might be as in chancery.

The present inquiry, is, then, in view of the considerations above stated, reduced to this: could these plaintiffs formerly have joined in chancery? In solving this question we may be aided by considering the nature of the contract upon which the suit is brought. The obligations which it imposes are strictly several, each party for himself becoming bound in a certain event to pay. The obligation thus assumed is, under the facts alleged, to each one of the plaintiffs separately, by each defendant, for one-fifth of such sum as that plaintiff was obliged to pay for a substitute for himself. This proportion, thus due to one, cannot be either increased or diminished by the fact that another plaintiff is also entitled to recover from the same defendant a like proportion of the sum paid by him for a substitute. Each plaintiff has an interest only in compelling the defendants severally to reimburse him, and cannot possibly be affected by the success or failure of any one of his co-plaintiffs in the suit. Each plaintiff seeks by the action to attain an object for himself exclusively,—the recovery of so much money as the defendants respectively owe him. They have therefore no common or joint interest in the relief sought, which is the object of the suit. Nor have they any common or joint interest in the subject[5] or foundation of the action, which is the failure of the defendants respectively to pay according to contract. The failure to pay Goodnight does not concern any other plaintiff, and so, the failure to pay each of the plaintiffs is a matter of entire

[5] For an analysis and definition of "subject of the action" see McArthur v. Moffett, 143 Wis. 564, (1910).

indifference to each of the others. If each two of the five persons to this agreement had mutually contracted by a separate writing to pay one-fifth of whatsoever sum might be necessary to procure a substitute for either, if drafted, there would have been twenty separate paper contracts, instead of one as now. It was a matter of convenience merely that one writing, executed by all, should have been adopted to evince their several undertakings; but it imposed exactly the same liabilities as if twenty writings such as we have mentioned had been used. In the latter case it would be too plain for doubt that each plaintiff must sue separately. Why should it be otherwise now? There is certainly no good reason. The statute has, it is true, provided, that persons severally and immediately liable on the same instrument may, all or any of them, be sued in the same action at the plaintiff's option. 2 G. & H. 50, sec. 20. This perhaps authorizes each of the present plaintiffs to join all the defendants in one suit. It is but the old equity rule as to defendants, in cases upon a joint and a several contract, extended by the statute. Story Eq. Pl. § 159. It may, however, be worthy of consideration whether this statute was intended to apply to cases where by one instrument each maker becomes singly liable for a sum for which no other maker can in any event be held. But that question is not before us, nor is it now intended to express any opinion upon it.

In Tate v. O. & M. R. R. Co., 10 Ind. 174, it was said that "all who are united in interest must join (as plaintiffs) in the suit, unless they are so numerous as to render it impracticable, while those who have only a common interest in the controversy, may, one or more of them, institute an action. This, however, must not be understood as allowing, in all cases, two or more persons having separate causes of action, though arising out of the same transaction, to unite and pursue their remedies in one action. Several plaintiffs cannot by one complaint demand several matters of relief which are plainly distinct and unconnected. But where one general right is claimed, where there is one common interest among all the plaintiffs, centering in the point in issue in the cause, the objection of improper parties cannot be maintained." This statement of the general rules governing the subject, though quite comprehensive, is perhaps as specific as the state of the authorities will warrant. The matter is, in considerable measure, a question for the exercise of

judicial discretion under the circumstances of each particular case, with a view to practical convenience in the administration of justice.

In the case before us there is in the plaintiffs no community of interest in any matter involved in the suit; no right common to all is claimed; every thing is separate save only that the right asserted by each is founded in a contract which for convenience happens to be upon the same sheet of paper. We have failed to find any warrant in the adjudged cases for a joinder of plaintiffs under such circumstances. The only possible suggestion in its favor is that a multiplicity of suits would be avoided; but even that is more apparent than real, and would be accomplished only in name, and not in fact. The number and variety of separate issues to be tried and of distinct judgments to be rendered would not be diminished in the least.[6]

Judgment affirmed.

RIZER v. CALLEN.

Supreme Court of Kansas, 1882. 27 Kansas, 339.

HORTON, C. J.: A. W. Callen, John Cross, John K. Wright, Henry Mitchell, A. Clough, R. E. Lawrenceson, and Moses Waters, with others, were sureties upon the official bond of Robert O. Rizer the county treasurer of Davis county. His term of office as treasurer expired on Oct. 12, 1880, and there was due from him as such treasurer the sum of $12,837.47. Of this amount Rizer paid $1,248.55, leaving a balance due of $11,588.92. Afterward the parties above named, with other sureties, were sued upon the official bond of the defaulting treasurer to recover the moneys so withheld by him, and the suit was dismissed by compromise as to the said named parties, upon the payment by them of $3,500. On July 6, 1881, the sureties who had made this payment commenced their joint action against the plaintiff in error (defendant below), to recover $3,500, with interest thereon from the 5th day of March, 1881. Upon trial judgment was rendered in their favor for $3,653.11; and the

6 And so in Tennant v. Phister, 51 Cal. 511, (1876), where the contract bound the defendant to pay to each of several persons for the occupation of a number of tracts of land owned severally.

defendant below complains of this judgment, for several reasons.

1. It is contended in this behalf that as the testimony shows that each plaintiff furnished his proportion of the total payment, they have no interest in common, and therefore not being united in interest could not be joined as plaintiffs.

It appears from the record that, although Rizer was indebted in a sum exceeding $11,000, and an action had been brought against all of his sureties upon his official bond for the recovery of that amount, that a compromise was made by the plaintiffs below, whereby, for the consideration of $3,500, they were released and discharged from all further liability on the bond. While it is true that each of the sureties paid $500, or gave notes that were taken in satisfaction of $500, to make the $3,500, no one surety was released upon the payment of $500, but the whole of the $3,500 was jointly paid by said sureties for the defaulting treasurer; and the sureties were jointly interested in making the payment of the $3,500, because the release was obtained, not upon the payment of $500 by each, but upon the joint payment of the $3,500. If the compromise with the commissioners had been that each surety upon his individual payment of $500 would be released and discharged from all liability, there would be no joint or common interest[7] between the plaintiffs; but as these sureties agreed jointly to settle with the county for $3,500, to obtain a discharge of all, paying the $3,500, and thereafter performed their agreement by jointly paying said sum, they could join in a suit to recover the sum so jointly paid. In the case of Tate v. R. R. Co., 10 Ind., 174, to which we are referred by counsel of plaintiff in error, the plaintiffs were the owners of several lots, in front of which

[7] In Lindell v. Brant, 17 Mo. 150, (1852), it was held on common law principles, where several have agreed to contribute to the expenses of a suit in which they were all interested, and one failed to pay his share which was made up pro rata by the others, that they could not join in indebitatus assumpsit for money paid, etc., but each must sue separately.

In Sevier v. Roddy, 51 Mo. 580, (1873), it was held that in an ordinary case where several sureties paid the debt of their principal, they must sue separately for indemnity.

See also Pelly v. Bowyer, 7 Bush. 573, (Ky. 1870), to the effect that several distributees of an estate could not join in an action against the administrator to recover their respective shares.

the railroad company erected for a roadbed in the street an embankment and trestle-work, which excluded them from the street. The court there held that the plaintiffs, though not united in interest with each other, had the right to join in an action to compel the company to fill up the street on each side of the railroad track so as to make it passable, or to remove the road. We do not think this case is of any force against the ruling of the district court. The other authorities cited by the same counsel are to the effect that where two or more persons have separate causes of action against the same defendant, though arising out of the same transaction, they are not allowed to unite and pursue their remedies in one action. We fully agree as to the law thus declared, but do not think the cause at bar controlled by it, because, under the compromise, a certain payment was agreed to be made for the discharge of the sureties, and this payment was jointly made by them for the discharge of all making the payment. The parties to this action were united in interest in making the compromise—in raising the $3,500, in paying the $3,500, and therefore had a right to be joined as plaintiffs. (1 Parsons on Contracts, 5th ed., ch. 20, p. 20; Appleton v. Bascom, 3 Metc., 169; Hopkins v. Lane (N. Y. Ct. of Appeals, Jan., 1882), 13 Rep. 343; May v. May, 1 C. & P., 44.) In the last case the action was brought by the plaintiffs to recover the sum of £446 paid by them as bail for the defendants. To make up this sum of money, each of the plaintiffs advanced his share. It was therein contended by defendants that separate actions ought to have been brought by each of the plaintiffs, because the money paid was the money of each, and that there could not be a joint action unless it was paid from a joint fund. The court was of the opinion that as the plaintiffs made the payment to the defendants in one sum, and as a joint payment, the action could be maintained in the form in which it was brought. * * *

Judgment affirmed.

WINNE v. NIAGARA FIRE INSURANCE CO.

Court of Appeals of New York, 1883. 91 N. Y. 185.

Appeal from order of the General Term of the Supreme Court, in the third judicial department, entered upon an order made November 23, 1881, which affirmed a judgment in favor of plaintiffs, entered upon a verdict.[8]

ANDREWS, Ch. J. * * * The remaining question is whether a joint action lies in favor of the plaintiffs. The plaintiff Henry W. Winne was the owner of the property insured, and the plaintiff Benjamin J. Winne was mortgagee. The policy contains the clause, "loss, if any, payable to Benjamin J. Winne, to the extent of his mortgage interest therein." We think a joint action is proper. The plaintiffs have a common interest in enforcing the contract. The plaintiff Henry W. Winne has no adverse interest to that of his co-plaintiff. The fund is applicable, first upon the mortgage debt,[9] and when that is paid, the balance belongs to the mortgagor. It is we think quite appropriate, and in accord with the flexible rule of procedure now applied in courts of justice, to allow persons situated as are the plaintiffs, to unite in maintaining the action, and the practice is sanctioned by the language of the Code, and of adjudged cases. (Code, § 466 [446?]; Boynton v. Clinton, etc., Ins. Co., 16 Barb. 254; Ennis v. Harmony F. Ins. Co., 3 Bosw. 516; Lasher v. North Western Ins. Co., 18 Hun. 101.)

We find no error in the record and the judgment should therefore be affirmed.

Judgment affirmed.

DEPUY v. STRONG.

Court of Appeals of New York, 1867. 3 Keyes, 603.

The plaintiffs were non-suited at the trial on the ground that

[8] Statement condensed and part of opinion omitted.

[9] For cases where the mortgagee, to whom the loss is payable, may sue alone as the real party in interest, see note to Burr v. Beers, ante p. 148.

the action should have been brought by all of the co-tenants jointly.[10]

GROVER, J.: The law in this state prior to the enactment of the Code was settled, that tenants in common must all join in an action of trespass to recover damages for injuries to real estate held in common. (Hill v. Gibbs, and cases cited, 5 Hill. 56.) The rule applied to personal and not to real actions. It was founded upon the idea that it was an injury to the possession, and that as the possession of one tenant in common was regarded as the possession of all, the injury was to their joint right, and therefore all must join in prosecuting the remedy. The law having been so determined, it must still be so held unless changed by the legislature. It is claimed that section 111 of the Code has changed the law in this respect. That section provides that every action must be prosecuted in the name of the real party in interest, with exceptions not applicable to the present case. The only change effected by this provision was to enable courts of law to treat assignments of certain choses in action as transferring the legal title, which, at common law, transferred only the equitable. The rule at the common law was, that the owner of the legal title must sue. Section 119 has (I think) no bearing upon the question in this case. That provides that those united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have joined as plaintiff cannot be obtained, he may be made a defendant; the reason thereof being stated in the complaint. This clearly does not authorize the omission[1] of a party

10 Statement condensed from the report of this case in 37 N. Y. 372.

1 For the same reason tenants in common of a chattel should join in an action for its conversion, Whitney v. Stark, 8 Cal. 514, (1857); Thompson v. Ry., 80 Mo. 521, (1883).

In such cases where the non-joinder is waived by failure to demur or set it up in the answer, the damages are apportioned. Van Hoosier v. Ry., 70 Mo. 145, (1879).

Where it is sought to recover in quasi contract on the theory of a waiver of the conversion, all of the tenants in common must join, Hunter v. Yarborough, 97 N. C. 68, (1895).

Tenants in common of land may join to recover possession, or one may sue separately, Mathis v. Boggs, 19 Nebr. 698; Brown v. Warren, 16 Nev. 228, (1881); as to whether one tenant in common suing alone may recover possession of the entire tract, or only of his share, see King v. Hyatt, 51 Kan. 504, (1893).

Apparently at common law the recovery in such cases was limited to the plaintiff's undivided share,

which the existing law required. It is said that it would be incongruous to make one tenant in common a co-defendant with a trespasser, upon his refusal to join as plaintiff. This is so, but the answer is, that that is the only remedy provided by the Code for a case when before if he refused to join as plaintiff, his co-tenant could not maintain an action at all unless the court, upon the special facts, permitted his name to be used as plaintiff. I think it clear that the Code has not changed the law as to the requisite parties in this class of actions. The question arises as to the mode in which the defendant may avail himself of the omission to join a co-tenant as plaintiff. Previous to the Code, this could only be done by demurrer where the defect appeared upon the margin, or in case it did not, by plea in abatement. The latter plea has been abolished[2] by the Code. The only mode provided for presenting a defense being by demurrer or answer, section 144, among other things, provides that a defendant may demur to the complaint when it shall appear upon the face thereof that there is a defect of parties plaintiff or defendant. In the present case, the defect of parties plaintiff did appear upon the face of the complaint. The plaintiffs alleged that they owned an undivided interest in the land. The remaining interest must of necessity have been owned by others, either as joint tenants or tenants in common with the plaintiffs. In either case the co-tenants were necessary parties. One mode of presenting this question, provided by the Code, was by demurring to the complaint. This the defendants interposed. The Special Term erroneously overruled it, and gave the defendants leave to answer. The defendants answered, setting up, among other defenses, the defect of parties plaintiff. This was an abandonment of the demurrer, and placed the case in the same position as though none had been interposed. It remains to inquire whether, in case the defect does appear upon the face of the complaint, it can be made available by answer. This inquiry is answered by section 147. That pro-

Denne v. Judge, 11 East. 288, (1809); Doe v. King, 6 Exch. 791, (1807).

Since any tenant in common may sue separately in ejectment, it seems that he cannot make an unwilling co-tenant a defendant, McNear v. Williamson, 166 Mo. 358.

2 The code abolished the plea in abatement in name but not in substance, since it expressly allows the same defence to be made by answer, Ed.

vides that when any of the matters enumerated in section 144 do not appear upon the face of the complaint, the objection may be taken by answer. This clearly implies that when the defect appears upon the face of the complaint, it is available only by a demurrer to the complaint. This being so, setting it up in the answer is a mere nullity. The defendants, instead of answering, should have appealed from the judgment ordered upon the demurrer. It has been repeatedly held by this court that defects of this description must be insisted upon in the mode provided by the Code, or they are waived. (33 N. Y. 43; 32 id. 635.)

The judgment appealed from must be reversed and a new trial ordered. If the defendant has any relief under the peculiar facts of this case, it is by obtaining leave in the Supreme Court to withdraw his answer, and let judgment be entered upon the demurrer.

Judgment reversed.

PORTER v. FLETCHER.

Supreme Court of Minnesota, 1879. 25 Minn. 493.

Gilfillan, C. J.—The complaint alleges that in May, 1877, the defendants owned six certain lots in an addition to Minneapolis, and, to induce plaintiff and one Libby to purchase the same, and with intent to cheat and defraud them, falsely and fraudulently represented to them that the lots extended out to and fronted on Twenty-first avenue south, and Minnahaha avenue, and thence back to an alley through the centre of the block, and were about the ordinary size of lots in that vicinity—to wit, about fifty feet front by about one hundred and fifty-seven feet deep; and that, believing in said representations, the plaintiff and Libby purchased the lots from defendants, and paid them therefor $3,000, and defendants conveyed the lots to them; that such representations were false, and known to defendants to be so; and that, except as to a part of one of them, the lots do not extend to the avenue, but that a strip of land about forty feet wide, owned by other persons, and not conveyed by defendants' deed, lies between the lots and the avenue;

that afterwards and before they discovered the fraud, plaintiff and Libby made partition of the lots, each taking in severalty three of them; alleges that, by reason of such matters, plaintiff had sustained damages to a specified amount, and demands judgment therefor. The defendants demurred: first, for defect of parties plaintiff, because Libby is not joined; and, second, because the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled. * * *

The first ground of demurrer is well taken. An objection is made that a demurrer for defect of parties will not lie, except it appears from the complaint that the original proper party to the cause of action not joined is still alive, so that he can be made a party, or, if dead, who succeeded to his interest or liability, as seems to have been required in a plea in abatement for want of proper parties, at common law. If this were so, it would be difficult to conceive a well-drawn complaint upon which the question of want of proper parties could be raised by demurrer. The demurrer given by the statute is not a mere substitute for the plea in abatement. The former raises a question of law upon the facts stated in the complaint. The latter presented an issue of fact, and as it was regarded as a dilatory plea, strict rules were applied to it, and it was required to state the facts so fully as to exclude the possibility of its having been improperly interposed. The demurrer presents the issue of law that upon the facts stated in the complaint, no other facts appearing, another party named should be joined as plaintiff or defendant. If, on these facts standing alone, some other party should be joined, the complaint ought to have alleged other facts, showing that the interest or liability of such other party had ceased.

The cause of action accrued when the defendants obtained the consideration for the purchase through the fraudulent representations, and if joint, it could not be divided by mere acts of the purchasers. That it was in them jointly hardly admits of question. It was a joint purchase, a joint contract. If, after the conveyance was made, they had failed to pay the consideration, the cause of action to recover it would have been against them jointly, and not severally. Their joint interests were prejudiced by the fraud; the wrong was against them as joint contractors. The case is not affected by the fact that, after the conveyance to them, the statute annexed to their title the in-

cidents of a tenancy in common and not of a joint tenancy, but must be governed by the character of the transaction as between them and defendants. The demurrer for defect of parties should have been sustained.

Order reversed.

BORT v. YAW.

Supreme Court of Iowa, 1877. 46 Iowa 323.

These plaintiffs allege that they bought of the defendant two promissory notes, one for the sum of $240.00, executed by James Evart, and one for $51.97, executed by Eden R. Latta; that the defendant, willfully and fraudulently to cheat and defraud plaintiffs, represented that the makers of the notes were perfectly responsible; that the representations were false, the makers at the time being insolvent; that plaintiffs, by reason of said false representations, were induced to purchase the notes. A writ of attachment was sued out and levied upon the property of defendant. The evidence being introduced, the court upon motion of defendant dissolved the attachment, for the reason that no order therefor was made by a judge of court. The court also, on motion, dismissed the cause, for the reason that there is a misjoinder of parties plaintiff. The court, thereupon, rendered judgment against plaintiffs for costs. The plaintiffs appeal.

DAY, Ch. J.: The evidence shows the folowing facts: At the time of the transaction complained of Yaw owed Baldwin for a couple of colts, and was negotiating for the purchase of a colt from Baldwin and also for the purchase of one from the plaintiff Bort. He proposed to turn over the Evart note for the colts and what he owed Baldwin. Whilst the negotiation was pending, Bort proposed to sell to defendant a piano for $200, and defendant offered him the balance of the Evart note, the Latta note, and his own note for $91.00. This proposition was accepted. The plaintiff, Baldwin, for his colt and what defendant already owed him, obtained a part interest in the Evart note. The plaintiff, Bort, for his colt and piano, obtained the balance of the Evart note, the Latta note, and the note of de-

fendant. The trades were made at the same time, but they were wholly distinct. Bort had no interest in Baldwin's trade and Baldwin had no interest in Bort's trade.

It was during these trades that the false and fraudulent representations complained of, as to the solvency of the makers of the notes, were made.

This action, it must be observed, is not brought upon either of the notes, but is brought to recover damages sustained by the fraudulent representations, whereby plaintiffs were induced to part with their property. There is no pretense that either plaintiff had any interest in the property of the other. The false representations gave each a right to an action for the damages he sustained, but did not give them any right to maintain a joint action. The damages were just as distinct as those arising from slanderous words, at the same time spoken of two persons. See Hinkle v. Davenport, 38 Iowa 355. We have here the union of two separate and distinct causes of action existing in favor of distinct parties, neither having any interest in the cause of the other. It is claimed that under section 2649, 2650 of the Code the objection, not having been taken by either demurrer or answer, is waived. But this is not a case of defect of parties, as contemplated in section 2648, but a misjoinder of parties. An amendment might have been made by striking out the name of one of the parties, or dismissing the cause of action as to one. Hinkle v. Davenport, *supra*. But this was not done, and both parties stood before the court asking judgment. In Cogswell v. Murphy, p. 44, *ante*, it was held that judgments could not be rendered against three defendants, for damages done by their cattle, the proof showing that each defendant owned some of the cattle, and that none of them were jointly owned by the defendants. That was a case in which separate actions should have been brought against the defendants; this is one in which separate[3] actions should have

[3] And so in Gray v. Rothschild, 112 N. Y. 668, (1889) where several firms had been induced to extend credit to a debtor by reason of the same or similar false representations. See also Taylor v. Brown, 92 Ohio St. 287, (1915).

In Simar v. Canaday, 53 N. Y. 298, (1873) it was held that a husband and wife were properly joined in an action for damages for fraud by which the husband had been induced to convey his land, and the wife to release her dower therein. But see Reed v. Sang, 21 Wis. 678, (1867), that in such a case the wife was not a proper party because the entire right of action was in the husband.

been brought by the plaintiffs. The principle involved is the same. The court did not err in sustaining the motion to dismiss the cause. The cause being properly dismissed, the ruling upon the motion to dismiss the attachment becomes immaterial, and it is not necessary to review it.

Affirmed.

SCHIFFER, Adm'r. v. THE CITY OF EAU CLAIRE.

Supreme Court of Wisconsin, 1881. 51 Wis. 385.

The action is brought to recover damages for flooding the plaintiff's house and lot, situate in the city of Eau Claire, by the maintenance of a dam across the Chippewa river by the defendant. The complaint shows that the premises flooded are a lot containing one acre of land, with a dwelling-house and appurtenances situate thereon; that one Winnard Eller owned the same in fee; that he died intestate in 1873, and left a widow, Magdalena Eller, and seven children, his only heirs-at-law; and that Otto R. Schiffer is the duly appointed administrator of the estate of said deceased. The widow, children and administrator all join in this action as plaintiffs. The complaint alleges that the house and a quarter of an acre of the land were the homestead of the deceased at the time of his death, and the widow is entitled to an estate therein during her widowhood, and that she is still the widow of the deceased; that all the premises have been occupied by the widow and her children ever since the death of the deceased, without any setting apart of the homestead, or the widow's dower in the remainder of the premises, and were so occupied at the time of the injuries complained of. After alleging the erection and maintenance of the dam by the defendant, the complaint alleges that, by reason thereof, the water of the river percolates through the banks of the river and overflows and submerges a considerable portion of the premises, and has greatly damaged and does greatly damage the same, etc. * * *; and that thereby the plaintiffs have sustained injury and damage in the sum of $1,200.

To this complaint the defendant demurred, and alleges as grounds of demurrer, (1) that several causes of action have

been improperly united therein; and (2) that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendant appealed from the order.[4] * * *

TAYLOR, J.—The appellant insists that there are three separate causes of action stated in the complaint, viz.: (1) a cause of action in favor of the widow alone for the injury done to the homestead; (2) a cause of action in favor of the children of the deceased for the injury done to the estate in remainder, as to the homestead; and (3) a joint cause of action in favor of the widow and children for the injury done to the three-fourths of an acre which is not a part of the homestead. As to this last cause of action it is not denied that the widow and children may properly join as plaintiffs. It being conceded that the parties are properly joined as to the third cause of action, the only question to be determined upon this appeal is, whether the persons owning the remainder may join in an action with the person owning the intervening estate, to recover damages caused by the same unlawful act of the defendant, when it is shown that the persons owning the intermediate estate and the estate in remainder are both injured by such act. The learned counsel for the appellant do not contend that an action cannot be maintained by the person owning the estate in remainder during the continuance of the intermediate estate, when the injury complained of is detrimental to the estate in remainder. That such action may be maintained by the remainder-man, especially against a stranger to the title, is well settled by the authorities. Van Deusen v. Young, 29 N. Y. 9; Pomfret v. Ricroft, 1 Saunders 321, note 322b; Queen's College v. Hallett, 14 East 489; Jackson v. Pesked, 1 Maule & Selwyn 234; Chitty's Pl. 140.

But it is insisted by the learned counsel for the appellant, that, as the damages which the remainder-man can recover do not belong to the person owning the intermediate estate, and *vice versa,* the causes of action are separate and distinct in favor of the separate plaintiffs, and cannot, therefore, be joined. It is not contended that if this were an action to abate the defendants dam as a nuisance to the plaintiffs, they could not all properly join in such action under the provisions of section 2602, R. S. 1878. See Bliss on Code Pleadings, § 73, and cases cited;

[4] Statement condensed and parts of opinion omitted.

Williams v. Smith, 22 Wis. 594; 1 Wait's Practice 112. The section reads as follows: "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided by law." But it is argued that because this is an action which was formerly denominated an action at law, and because the relief demanded is compensation in money only for the injury sustained, and because the money recovered will belong to the plaintiffs in severalty in proportion to the injury each has sustained, the plaintiffs cannot join in the action. Certainly this objection is not taken in the interest of the defendant, and, if it must prevail, it must prevail on account of some technical rule which remains in force notwithstanding the code. So far as the defendant is interested, it would seem for his protection that all persons whose estate or interest in the same property has been injured by the act of the defendant, should join in the action. The judgment would bar all the plaintiffs and save him the expenses of several suits instead of one. In such case the whole damage to the property could be much more readily ascertained than if the court and jury were compelled to divide it up and determine how much the injury was to the remainderman, and how much to the person owning the intermediate estate. That there might be difficulty in determining the rights of the plaintiffs, as between themselves, is a matter which does not concern the defendant, and he is relieved from this difficulty by the joinder of the parties. Bliss, in his work above quoted, section 74, says: "But it has come to be generally conceded that the rule under consideration is universal in its application, as it is in terms; and if two or more are interested in the subject of the action, and in the relief sought, they may unite as plaintiffs for the recovery of money or other specific real or personal property." And in speaking of the objection as to the difficulty of adjusting the rights of the plaintiffs between themselves, he says: "But the suggestion supposes that the several rights will always be ascertained by the verdict. While in many cases this may be done, and must be done when the extent of the liability depends upon the amount of each of the several claims, yet otherwise and in other cases the verdict need only find the fact of the defendant's liability and its amount, leaving the adjustment among the plaintiffs to be made by themselves after judgment, or by the court before it is entered." * * *

In the case at bar, the subject of the action is the premises owned by the plaintiffs, and the cause of action is the injury done to the premises by a single act of the defendant. All the plaintiffs have an interest in the subject of the action, and in obtaining the relief demanded, and are properly united in the action. There is, therefore, no improper joinder of causes of action. This view of the case is also sustained by this court in Samuels v. Blanchard, 25 Wis. 329; Bassett v. Warner, 23 Wis. 673, 686; Welch v. Sackett, 12 Wis. 243; Stevens v. Campbell, 13 Wis. 375; Gates v. Boomer, 17 Wis. 455; Peck v. School Dist., 21 Wis. 516, 520; and in the following cases in other courts: N. Y. & N. H. Railroad Co. v. Schuyler, 17 N. Y. 592, 606; Simar v. Canaday, 53 N. Y. 298, 306; Owen v. Frink, 24 Cal. 171.[5] * * *

We agree with the learned counsel for the appellant that no cause of action is stated in the complaint in favor of the administrator; that he is a superfluous party; and that such a superfluity of parties cannot be taken advantage of by the demurrer of the defendant filed in this action. Marsh v. Supervisors, 38 Wis. 250; Willard v. Reas, 26 Wis. 540.

By the Court.—The order of the circuit court is affirmed.

HELLAMS v. SWITZER.

Supreme Court of South Carolina, 1885. 24 S. C. 39.

MR. JUSTICE MCGOWAN.[6]—This was an action to abate an alleged nuisance and for damages against the defendant Switzer for erecting on his land immediately below and adjoining the lands of the first named plaintiff a dam across a stream known as North Raburn Creek, in Laurens County. The plaintiffs, R. Y. and P. M. Hellams, as tenants in common owned one tract of land immediately above the land of the defendant, and each of the other nine plaintiffs, viz., W. L. Hopkins, J. R. Brownlee, G. W. Anderson, J. R. Childress, D. D. Harris, Hannah Babb,

[5] See also Shepard v. Ry., 117 N. N. Y. 442, (1889), where the life tenant and remaindermen were permitted to join in an equitable action for an injunction and damages.

[6] Parts of the opinion omitted.

William Hellams, L. R. Babb, and Gideon Yeargin, owns a separate and distinct parcel of land on the creek above the aforesaid dam, and none of them has any interest in the lands of either of the others named.

The plaintiffs all unite in one complaint and in stating one cause of action. * * *

The defendant demurred to the complaint upon the ground "that several causes of action were improperly united in this, that it appears upon the face of the complaint that the several plaintiffs are owners of separate and distinct tracts of land, and that one plaintiff has no interest in the lands of the others," &c. On hearing the cause, Judge Pressley passed the following order: "It is ordered and adjudged, that the first ground of demurrer be overruled. It is further ordered and adjudged, that the second ground of demurrer be sustained, with leave to the plaintiffs to amend their complaint if they desire to do so."

The plaintiffs and defendant both appeal—the plaintiffs on the ground that his honor erred in holding that the complaint did not state facts sufficient to constitute a cause of action; the defendant on the ground that his honor erred in overruling the written demurrer of the defendant, and in not holding that several causes of action had been improperly united. * * *

The action being for damages on account of a private nuisance and to abate the same, must be considered to be an action at law, such as, under the old procedure, would have been called "an action on the case." * * *

Being, then, an action at law, it is perfectly plain that, according to the old procedure it would be a misjoinder to unite in one action two or more plaintiffs, having separate and distinct rights in parcels of land claimed to be injured by the same cause. Mr. Pomeroy says: "The requirements of the common law rules that all persons jointly interested shall unite as plaintiffs in any action brought to maintain the interest, and that in the case of a several right, each separate holder of it should sue alone, was very peremptory, and upon these were based the form, extent, and even possibility of the judgment to be rendered. * * * Persons jointly entitled, or having a joint legal interest in the property or other rights affected by a tort, must join in actions brought to recover damages therefor. On the other hand, when the interest and right and the damages are both several, each person who has suffered the wrong must

sue separately. In accordance with this principle, two or more plaintiffs cannot in general sue for torts to the person or character, such as assaults, libel, slander, and the like," &c. Pom. Rem. §§ 184, 189.

But the code has changed in some respect the modes of procedure, and the question now is, whether it has so changed the law in relation to parties, as to allow a number of plaintiffs, having no interest in common, but separate and distinct rights, to unite in one action for damages in bulk, to their respective rights of person and property, alleged to proceed from the same cause. A careful examination of the code will disclose the fact that it does not in terms repeal the old law as to parties, which, as we suppose, is still the law wherever it has not been superseded or repealed by necessary implication. The question is really one of construction as to how far the code has abrogated or modified the old rule upon the subject. Section 138 provides that, "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title." And section 140 declares, "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone, who should have been joined as plaintiff, cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or where the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."

These provisions are certainly very vague and indefinite. The object, doubtless, was to simplify the procedure, but it seems to us that, in this instance at least, it was not attained. There is certainly upon this point as much confusion and obscurity now as before the adoption of the code. These sections of our code are substantially the same as those of the code of New York, and, indeed, of most of the states, which have adopted the reformed procedure. We might, therefore, have expected to find some uniformity in the decisions, but such is not the case. No parts of the codes have excited more discussion or difference of opinion in the courts. These provisions as to parties were manifestly modelled upon the old practice in equity which, from the nature of its issues and especially the mode of trial, was

flexible, allowing the chancellor to decide the rights of all parties whether they were before him as plaintiffs or defendants; and, therefore, while it was important to have all the parties in interest before the court, it was not considered necessary to distinguish nicely as to the nature and extent of their interest, or whether they were plaintiffs or defendants. For this reason, probably, it was soon found that there was no serious difficulty in applying the new rules of the code to proceedings which were purely equitable in their character and prayed only equitable relief. And it will be observed that the section from Pomeroy (269), cited by the plaintiffs as authority for the joinder in this case, is found under the head of parties "plaintiff in equitable actions."

But great difficulty arose in application of the code rules taken from equity to law cases for enforcing legal rights, in which the decision is not by the chancellor, but by the jury, with less liberty of action and without the power to apportion damages among joint plaintiffs. See Bannister v. Bull, 16 S. C. 230. This difficulty was felt from the beginning, and at least three States (Ohio, Indiana and Wisconsin) still hold that the provisions of the code as to parties were not intended to apply to law cases, involving rights purely legal, but only to continue the same practice which had prevailed before, in proceedings equitable in their nature, after the code prescribed one form of action for all alike. Pom. Rem. §§ 213 and 215. But the code does not make any such exception, and it seems that in conformity with its terms the weight of authority is in favor of applying the provisions, as far as practicable, to all actions alike, legal as well as equitable.

It does not, however, follow that the rules of the code abolish entirely the common law requirements in actions strictly legal. "It must be observed, in this connection, that in a vast number of actions strictly legal the equitable theory of parties, as stated in these clauses, would determine the proper parties thereto, in exactly the same manner as the common law theory." Pom. Rem. § 122. This is certainly not a case under the "common or general interest" clause, in which one or more might sue for the benefit of all. Warren v. Raymond, 17 S. C. 204. It is a case in which the inquiry is, whether all the plaintiffs have such "an interest in the subject of the action and in the relief

demanded" as authorize them to unite in a joint action for joint damages and to abate the alleged nuisance.

Without going into the learning upon the subject, or endeavoring to reconcile the conflicting decisions, it will be sufficient for the purposes of this case to quote the rule as laid down by Mr. Pomeroy, the greatest expounder of the codes and an enthusiastic defender of its principles and procedure. In reference to actions by persons having several rights arising from personal torts, he says: "Where a personal tort has been done to a number of individuals, but no joint injury has been suffered and no joint damages sustained in consequence thereof, the interest and right are necessarily several, and each of the injured parties must maintain a separate action for his own personal redress. It follows, therefore, that when a tort of a personal nature, an assault and battery, a false imprisonment, a libel, a slander, a malicious prosecution and the like [nuisance, we suppose] is committed upon one or more, the right of action must, except in a very few special cases, be several. In order that a joint action may be possible, there must be some prior bond of legal union between the persons injured, such as a partnership relation, of such nature that the tort interferes with it, and by virtue of that very interference produces a wrong and consequent damage common to all. * * * The doctrine above stated has been fully recognized and asserted by the courts since the codes were enacted. A fire company, a voluntary association, having been libelled, a joint action by its members to recover damages against the libellor was held improper; not being partners, and not having any community of legal interest whereby they could suffer a common wrong, the right of action was several and each must sue alone. The same rule has been applied in the case of two or more persons, not partners, suing jointly to recover damages for a malicious prosecution; the action cannot be maintained." Pom. Rem. § 231; Giraud v. Beach, 3 E. D. Smith 337; Hinkle v. Davenport, 38 Iowa 355; Stepanek v. Kula, 36 Id. 563; Rhoads v. Booth, 14 Id. 576.

In the last case cited, three plaintiffs sued jointly for a malicious prosecution. Wright, justice, said: "As a rule, it is only when two or more persons are entitled to, or have a joint interest in, the property affected, or to the damages to be recovered, that they can unite in an action. Therefore,

several parties cannot sue jointly for injuries to the person, as for slander, or battery, or for false imprisonment. For words spoken of parties in their joint trade, or for slander of title, they may sue jointly; but not so when two or more sue for slanderous words which, though spoken of all, apply to them all separately; or in case of false imprisonment or a malicious prosecution, when each, as individuals, are imprisoned or prosecuted. The principle underlying is, that it is not the act, but the consequences, which are looked at. Thus, if two persons are injured by the same stroke, the act is one, but it is the consequences of that act, and not the act itself, which is redressed; and, therefore, the injury is several. There cannot be a joint action, because one does not share in the suffering of the other." The court further held that the objection might be taken at the trial.

The judgment of this court is, that the judgment of the Circuit Court be affirmed; that the plaintiffs may amend by striking out all the plaintiffs but one, or otherwise, if so advised.

TROMPEN v. YATES.

Supreme Court of Nebraska, 1902. 66 Neb. 525.

HASTINGS, C.: This was an action brought by the defendants in error jointly, claiming damages for the conversion by plaintiff in error, as sheriff, of certain goods. February 18, 1897, Frances E. Price gave a chattel mortgage on her stock of drugs in the store at the corner of Tenth and P streets, in the city of Lincoln Neb., for $500, to her husband, J. W. Price. The same day she also executed a chattel mortgage on the same drugs to J. R. Nichols for $100, for services as a clerk in the store; also to Chas. Yates for $40, for services in the store; also to J. D. Johnson for $25, for grocery bill; also to Victor Weiler for $20, borrowed money; also to W. L. Garten for $30, borrowed money; also to C. M. Seitz for $20, grocery bill; and also to F. J. Kelley for $350. Of this amount $266 was claimed to be due for past services, $40 for borrowed money, and the remainder for contemplated services in upholding the transfers; but on this indebtedness to Kelley was to be credited $90.15, store

account. A mortgage was also made to the Lincoln Drug Company for $110, and to W. E. Clarke for $350, and to Kipp Bros. for $110, to secure indebtedness due them. The execution and filing of the mortgages were without the knowledge of the mortgagees, except Price, Nichols, Weiler, and Kelley; but the action was ratified subsequently by all of the other mortgagees, who were parties to this action. The mortgages of Price, Nichols, Kelley, and Yates were all filed at 2:35 p. m.; the mortgages of Johnson, Weiler, Seitz and Garten at 2:40 p. m., and those of the Lincoln Drug Company, Clarke and Kipp Bros. at 2:45 p. m., on February 20, 1897. The mortgagee Kelley claimed to have taken possession of the stock of goods on behalf of the mortgagees immediately on the filing of the instruments, and to have placed an inscription on the front door, "Closed under Chattel Mortgage." He claims to have retained such possession until the goods were levied upon by Sheriff Trompen. The remnant of the goods left by the sheriff he claims to have sold for $585, and with the proceeds paid $100 to Nichols and $485 to Price. The answer alleges a misjoinder of causes of action; a misjoinder of parties plaintiff. * * * The petition of the plaintiffs below alleged that they were in the actual possession of the goods, and that these were wrongfully taken away from their possession by the defendant sheriff. Copies of their several mortgages were attached. A motion was filed by the sheriff to require the plaintiffs to more specifically state in what manner he had taken possession of the goods; to state particularly what merchandise was taken under execution, and what under attachment. A demurrer was also filed. First, that there was a defect of parties plaintiff; and, second, that the petition did not state facts sufficient to constitute a cause of action in favor of plaintiffs. Both motion and demurrer were overruled, and the defendants then answered as above stated.

Two briefs have been filed on behalf of the plaintiff in error, in one of which the sole question argued is the alleged misjoinder of the plaintiffs. It is urged that section 40 of our Code of Civil Procedure furnishes no warrant for joining these plaintiffs, because they have no common right; that their mortgages were filed at different times, and their holding cannot be joint. The result does not seem necessarily to follow even from

holding their mortgages separate and distinct liens upon the same property.

They allege a joint possession, which they say the sheriff has invaded. If, in fact, they were in the joint possession of these goods, and the sheriff wrongfully took them, it would seem to constitute a common wrong against all the tenants who were jointly holding. Each would have a joint interest with all the others in vindicating their joint possession. Their case would seem to come distinctly within the terms as well as the spirit of section 40 of the Nebraska Code of Civil Procedure. The question seems to be argued, however, as if there has been no attempt to take possession, and the plaintiffs were simply trying in this action to vindicate a right under their several mortgages. Even if such were the case, we think, under the holdings of this court in Earle v. Burch, 21 Neb. 710 (33 N. W. 254), and in the earlier case of Kaufman v. Wessel, 14 Neb. 162 (15 N. W. 219), and the approval that has been often given to both these cases, that this court is committed to the applying in law actions of the equity doctrine that interest in the subject of the action gives a right to join as plaintiff. Earle v. Burch certainly holds that successive mortgagees, merely as such, and where possession has not been had on any of the mortgages, may join in replevying the property. If in a replevin action, why not, then, in one for conversion? A distinction is sought to be made in the nature of the relief sought, in the one case an indivisible possession of the property which is the common subject of the plaintiff's rights; in the other a lump sum of money, in which plaintiffs have separate and possibly conflicting rights. But we have section 429 of the Code, providing expressly for this situation, and apparently adopted with precisely this extension of equity ideas to law cases in view. It provides: "Judgment may be given for or against one or more of the several plaintiffs, and for or against one or more of several defendants; it may determine the ultimate rights of the parties on either side, as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants, the court may in its discretion render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper. The court may also dismiss the petition with costs, in favor of one or more of the defend-

ants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served." Counsel say that these several lienholders have a common interest in the possession which is the subject of the action in replevin, but none in the whole amount of damages recoverable for the conversion. But what more interest has one lienholder in the other's possession than he has in the other's recovery of damages? The truth seems to be that the equity practice of taking into the action everybody who claims an interest in its subject-matter was the object aimed at in these Code provisions, and this court seems to have carried them out according to their letter and spirit. In Lancaster Co. v. Rush, 35 Neb. 119 (52 N. W. 837), the city of Lincoln was joined with the county in foreclosing a tax lien. This court says that the city need not have joined, but, as it had an interest in the sale certificate to the amount of its taxes, it properly might do so, under section 40 of the Code. Other jurisdictions have applied similar Code provisions in the same way. In Munson v. Railway Co. (Sup.) 65 N. Y. Supp. 848, it is held that an insurer, who has paid in part for property destroyed by the railway company's fault, can join in an action for damages. A similar case is Railway Co. v. Miller (Tex. Civ. App.) 66 S. W. 139. In England, in 1899, under similar statutory provisions, it was declared in Ellis v. Bedford, 68 Law J. Ch. 289, "All persons having a common right which is invaded by a common enemy, although they may have different rights *inter se*, are entitled to join in respect to that common right." In that case the common right was to the use of stalls in a market, and a part of the invasion was the exaction of illegal tolls for its use from the different plaintiffs. In Railway Co. v. Haber (Kan.) 44 Pac. 632, the joining of 145 parties in one action for damages by reason of the introduction of cattle having the splenic fever, and which communicated that disease to native cattle, was upheld. It is not thought that there was error in permitting the joint action of plaintiffs in this case. Counsel for the sheriff insist that the case of Gray v. Rothschild, 48 Hun 596, 1 N. Y. Supp. 299, is entirely parallel to the one at bar, and should control it. There is, however, a very manifest distinction between the two cases. The New York case was brought by creditors who had sold goods to the defendants. These goods were made away with

fraudulently. The creditors joined in an action for their value. It was held that it could not be maintained. The right of each plaintiff went, not to the whole goods, but only to the part of them bought from himself. In the present case such right as each mortgagee had, went to the entire lot of goods. Where to this is added joint possession, the right to recover jointly for their taking seems complete.[7]

Judgment affirmed.

PETTIBONE v. EDWARDS.

Supreme Court of Wisconsin, 1862. 15 Wis. 95.

This was an action to foreclose a mortgage given to secure three notes, payable to the plaintiff in one, two and three years from date, the last of which only was alleged in the complaint to be unpaid. The mortgagor stated in his answer that the second note was unpaid and had been assigned to A. Malvina Miles, who still owned it, with an interest in the mortgage sufficient to secure it, "and was a real party in interest in the matters in controversy in said action." The court excluded evidence of the facts stated in the answer, on the ground that they did not show a defect of parties, and gave judgment of foreclosure for the amount of the note held by the plaintiff.

By the Court, COLE, J. In this case the respondent, entitled to a part only of the mortgage money, commenced a suit to foreclose the mortgage as to his own part of the money. It appears that the mortgage was given to secure the payment of three promissory notes. The first note seems to have been paid. But it was alleged in the answer of the mortgagors, and evidence was offered on the trial in support of the allegation, that when the second note became due, the mortgagor not being able to pay it, the note was sold by the respondent to one A. Malvina Miles, and an interest in the mortgage sufficient to secure the payment

[7] Compare State ex rel. v. Beasley, 57 Mo. App. 570, (1894), where it was held that the holder of a first mortgage on store fixtures, could not join with one holding a first mortgage on the stock and a second mortgage on the fixtures in an action against the sheriff for a conversion of the stock and fixtures.

of the same, was assigned to him to her. The Miles note being unpaid, it was objected that there could be no foreclosure of the mortgage for the third note without making A. Malvina Miles a party to the suit.

It seems to us the objection was well taken. Mr. Justice Story, in his work on Equity Pleadings, section 201, states the rule as to who are necessary parties plaintiffs to a bill to foreclose a mortgage, as follows: "And it may be generally stated that all persons who have the legal interest in the mortgage, as well as those who have the equitable interest therein, are necessary parties to a bill to foreclose. There can be no redemption or foreclosure unless all the persons entitled to the whole mortgage money are before the court. Thus, for example, a person entitled to a part only of the mortgage money cannot file a bill to foreclose the mortgage as to his own part of the money, but all the other persons in interest must be made parties."

The rule is laid down in substantially the same language by Barbour, in the second volume of his work on Chancery Practice, 174. Monell reiterates the same doctrine, 2 Monell's Practice, 214. See also 1 Daniel's Plead. and Practice, 263; Edwards on Parties, pp. 45, 46 and 47. To the same effect are the cases of Lowe v. Morgan, 1 Br. C. R. 368; Palmer v. The Earl of Carlisle et al, 1 Simons & Stuart 423; Miller v. Henderson, 2 Stock Ch. R. (N. J.) 320; Davenport v. James, 7 Hare 249; Johnson v. Brown, 11 Foster, 405.

These authorities clearly sustain the position that the respondent should have made A. Malvina Miles a party to the foreclosure suit. A part of the mortgage money was coming to her. If she refused to join in the suit as party plaintiff, she might have been made defendant. But that she should be made a party to the foreclosure suit, either as plaintiff or defendant, in order that complete justice may be done between the parties, and the entire subject matter of the litigation disposed of, is to our minds clear upon reason and authority. For suppose a mortgage given to secure a debt payable in a dozen different installments, evidenced by as many promissory notes. Is the practice to be tolerated, when all the notes are due, of harassing the mortgagor by a dozen different foreclosure suits, because the notes are held by as many different persons, when one suit would settle the whole controversy, and do complete justice? We know of no beneficial purpose whatever to be subserved by such a

practice. The costs are greatly increased, and consequently the security for the debt correspondingly diminished. And the salutary rule that all persons materially interested in the suit should be made parties, is violated. A. Malvina Miles was certainly interested in the foreclosure of the mortgage. A portion of the money secured by that mortgage was coming to her. She was therefore an indispensable party.

The judgment of the circuit court is reversed, and the cause remanded with directions to that court to order the holder of the second note secured by the mortgage to be made a party, so that there may be a complete determination of the matter in controversy.

LILLY v. TOBEIN.

Supreme Court of Missouri, 1890. 103 Mo. 477.

BLACK, J.[8] * * * To the original petition filed in this cause the defendants demurred, on the ground, among others, that the unincorporated church society had no power or legal capacity to sue. The demurrer was sustained, and thereupon an amended petition was filed, adding as plaintiffs, John J. Lilly, Michael Howell, Patrick O'Malley, and Thomas Clark, members of, and alleged to be trustees of the church. These persons sue for themselves and all other members of the association. The amended petition also names one hundred or more persons, members of the church, as additional plaintiffs. To this amended petition the defendant demurred, and this demurrer was sustained as to the unincorporated association, but overruled as to the new plaintiffs brought in by the amended petition. * * *

The statute allows "any person interested in the probate of the will" to prosecute a suit to contest the same, or to have one proved which has been rejected by the probate court. Assuming that the church is capable of suing, the fact that it is by the will made a devisee gives to it an interest which entitles it to prosecute this suit. The question then arises whether that interest can be represented by the present plaintiffs.

[8] Statement and parts of the opinion omitted.

It appeared in the former suit, as it does now, that, at the death of the testator, the Catholic Church, at Lexington, was simply an unincorporated religious association. Thereafter, the members of the church organized as a corporation, and that suit was instituted by the incorporated association. It was held that the incorporation of the plaintiff did not vest in it the property rights of the church society, and for that reason the plaintiff could not maintain the suit. Trustees of a charity are often incorporated for the purpose of executing the trust, and, since the church society was doubtless incorporated to enable it the better to protect the devise in question, the correctness of the conclusion reached in that case, as to the rights of the corporation to prosecute the suit, may well be doubted. It was, however, held in that case, and we think correctly held, that the church society did not lose its existence, or become wholly merged in the corporation.

The constitution provides that "No religious corporation can be established in this state, except such as may be created under a general law for the purposes only of holding the title to such real estate as may be prescribed by law for church edifices, parsonages, and cemeteries." Art. 2, sec. 8. As a church can only be incorporated for the specified purposes, it was held that the church organization for religious purposes must continue after incorporation. In view of an intimation then made, this suit was commenced in the name of the unincorporated society, but a demurrer to the petition was sustained because of the want of capacity in the plaintiff to sue. It is now insisted that Lilly, O'Malley, Howell and Clark, who were made parties plaintiff by the amended petition and who are members of the church and sue for themselves and all other members of the association cannot prosecute this suit.

It is a well-established rule in equity pleading that one or more of the members of a voluntary association,[9] whether organized for public or for private purposes, may sue for and in behalf of all the members. Story Eq. Plead. (9th Ed.), secs. 94 and 114a. The right of a few persons to sue for themselves and all other persons similarly situated has been recognized by this

9 "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." Eq. Rule 38.

court on several occasions: 52 Mo. 81; 67 Mo. 203. It is true that this is an equity rule, and we have no statute extending it to actions at law, as is the case in some of the states. It has also been said in several cases that a suit to contest a will, or to establish one which has been rejected by the probate court, is an action at law. Lyne v. Marcus, 1 Mo. 410; Swain v. Gilbert, 3 Mo. 347; Young v. Ridenbaugh, 67 Mo. 574; McIlraith v. Hollander, 73 Mo. 112. Such a suit is doubtless one at law in the sense that it is a statutory proceeding. But this court said in the case of Eddie v. Parke's Ex'r, 31 Mo. 513, which was a suit to contest a will: "Although this is technically a proceeding at law, yet in many respects it partakes of the nature of a proceeding in chancery, and the rules recognized in courts of equity, with respect to the persons necessary to be made parties to a bill, we think, is to a great extent applicable to a case of this kind." Looking to the parties who should be brought before the court, the method of making up and submitting the issue of will or no will, and the character and form of the judgment, we can but conclude that a suit to contest or establish a will has many of the features of a suit in chancery; and the equity rule allowing one or more members of a voluntary association to sue for all should be applied to cases like the one in hand.

It results from what has been said that it is a matter of no consequence that some of the other named plaintiffs have died or ceased to be members of the church, or are minors, or married women. They may be disregarded as unnecessary parties. * * *

Judgment affirmed.

GATES v. BOOMER.

Supreme Court of Wisconsin, 1863. 17 Wis. 470.

By the Court, COLE, J. The first objection taken to the complaint, on the demurrer is, that the court has no jurisdiction of the cause. The complaint is filed by two judgment creditors of Lyman E. Boomer, for the purpose of setting aside and having declared void a deed given to him by his co-defendant, on the ground that it is fraudulent and void as to creditors. They

state that their judgments were obtained subsequent to the giving of said deed; that executions have been issued upon them, and returned unsatisfied; and that the judgment debtor has left the state and has no property here liable to seizure and sale. They therefore ask that the deed, which is an obstruction, be removed so that they can enforce their liens by a sale of the property upon execution. This general statement will suffice to understand the object of the suit.

We think the facts stated in the complaint bring the case within an ackowledged head of equity jurisdiction. As already observed, the object and purpose of the suit is to clear the real estate of the judgment debtor from an incumbrance fraudulently and improperly placed upon it to the injury and prejudice of the creditors. It is said, if the deed be void in respect to creditors, as is alleged, that then this suit is unnecessary, since there is no obstacle to the respondents enforcing their judgments by sales upon execution. But if the parties should adopt the course suggested, still it is very obvious that the existence of the deed would throw doubt and uncertainty upon the title and might prevent bidding entirely at the sales.

It is further objected that there is a defect of parties plaintiffs, and that it was irregular for the two judgment creditors to unite in the action. This point is clearly untenable. Both plaintiffs have a common interest in removing the fraudulent conveyance, so that they can enforce their respective judgments. And aside from our statute we think there would have been no misjoinder of parties plaintiffs. See case in 3 Paige, *supra,* (Clarkson v. Depeyster, 3 Paige, 320), and authorities there referred to. But our statute provides that all persons having an interest in the subject of the action and in obtaining the relief demanded, may be joined as plaintiffs, with certain exceptions not applying to this case. Sec. 18, ch. 122. This provision is unquestionably broad enough to meet the case at bar, since both plaintiffs have a direct and common interest in the subject matter of the suit and in the relief sought. The third objection, to-wit, that several causes of action are improperly united in the complaint, is disposed of in considering the question whether or not there was an improper joinder of the parties plaintiffs.

The next objection, that the several causes of action are

not separately stated,[10] is not sustained by the complaint, as an examination of its various allegations will abundantly show. * * *

Judgment affirmed.

WHITE'S BANK OF BUFFALO v. FARTHING.

Court of Appeals of New York, 1886. 101 N. Y. 344.

Appeal from the order of the General Term of the Supreme Court, in the fourth judicial department, made April 23, 1885, affirming an order of the Special Term denying motions (under § 452 of the Code) on the part of the German-American Bank of Buffalo, the Merchants' Bank of Buffalo the Third National Bank of Buffalo, and others, that they might be brought in as parties defendant herein.

The action was brought by plaintiff as judgment creditor of the defendant Matilda Farthing, to set aside certain conveyances of real estate made by her, which were alleged to be fraudulent as against creditors, and for the sale of such real estate, etc.; also to have plaintiff's judgment declared to be a lien on certain other lands.

The facts so far as material are stated in the opinion.

ANDREWS, J. The judgments in favor of the German-American Bank were recovered November 13, 1883, and the deficiency judgment in favor of the banks other than the plaintiff April 4, 1884. The judgment in favor of the plaintiff's bank was recovered February 4, 1884, and this action was commenced November 14, 1884. The several judgments became liens on lands fraudulently conveyed by Matilda Farthing, the judgment debtor, in the order of their docketing, and they could have been sold on executions issued on the judgments. The plaintiff, however, elected to bring its action to remove the alleged fraudulent obstruction created by the conveyances. If it succeeds in establishing the fraud, it will be entitled to a judgment set-

10 See also South Bend Plow Co. v. Cribb, ante, p. 37, where a number of simple creditors of an insolvent corporation joined in an equity suit to establish their respective demands against the debtor, and enforce payment out of property fraudulently diverted.

ting aside the conveyances simply, in which case it can proceed to enforce its judgment by a sale of the land on execution, unembarressed by the cloud created; or the court may proceed further and compel the fraudulent grantees to convey the lands to a receiver, to be sold to satisfy the plaintiff's judgment.

The judgments in favor of the other banks will in no way be affected, whichever form the judgment in this action may take. If it simply sets aside the fraudulent conveyances, the land will remain charged with the liens of the several judgments in the order of their docketing, and the proceedings to enforce them will be regulated by the statute. If it goes further, and appoints a receiver, and directs a conveyance to him, a purchaser under the receiver's sale will take title as to the time of the debtor's conveyance to the receiver, subject, however, to the judgments in favor of the banks other than the plaintiff. Chautauqua Co. Bank v. Risley, 19 N. Y. 369. The result of the plaintiff's action will not, therefore, affect the lien of the judgments in favor of the other banks who seek to intervene in this action.

The plaintiff seeks, also to charge the Swan street lot with the lien of its judgment, on the ground that Geo. Farthing, caused it to be conveyed to Kelley as security for a debt owing by him to Kelley, which has been since paid, and that the judgment debtor, Matilda Farthing, as the devisee of Geo. Farthing, is entitled to the land. The other banks may commence similar actions to reach the Swan street lot, and the plaintiff's action, followed by judgment in accordance with the relief demanded, will not prejudice any rights which the other banks may have to enforce their judgments against it. According to the rules established in this state, judgment creditors holding distinct and several judgments may unite in an action to set aside a conveyance by the common debtor, made in fraud of their rights as creditors. Brinkerhoff v. Brown, 6 Johns. Ch. 139. This is a convenient rule, but it is not a rule of obligation, but one conferring authority only. It has never been held that all judgment creditors so situated were necessary parties to such an action. We think section 452 of the code does not require the court, on application, to compel a plaintiff to bring in a judgment creditor, not originally made a party, as a party to an action instituted by him to set aside a fraudulent conveyance, although its power to direct it to be done cannot be doubted.

The rights of the creditor not made a party will not be prejudiced by the judgment in that action. A judgment creditor has no title to the land of the judgment debtor, but a lien only, which may, by subsequent proceedings, become the foundation of title; nor has he any interest in the subject matter of the action brought by another judgment creditor, within the meaning of that section. He may have an interest which will be subserved by having the conveyance set aside. But he will not be concluded by a denial of that relief in the action of the other creditor, and, whatever the result of that action may be, his rights and remedies remain as before.

The cases of People v. Albany & V. R. R. Co., 77 N. Y. 232, and Osterhoudt v. Supervisors, etc., 98 N. Y. 239, cited by the appellant, are not analogous. No effectual judgments could be rendered in those actions without directly cutting off or impairing rights of persons not parties, and it was held, in accordance with the settled rule in equity, that they should be brought in so that there would be a complete determination of the controversy.

We think the order appealed from was discretionary, and that the appeal should, therefore, be dismissed.

JEFFERS v. FORBES.

Supreme Court of Kansas, 1882. 28 Kan. 174.

Action brought by Jeffers and thirteen others against Forbes and another, to set aside certain deeds. At the September term, 1881, the court sustained a demurrer to plaintiff's petition, to which ruling they excepted, and have brought the case here for review.

BREWER, J. The plaintiffs in error (plaintiffs below) were respectively the widow and children of A. R. Jeffers, deceased, and filed their petition in the district court of Doniphan county, seeking to set aside six several deeds executed by themselves separately to the defendant, W. H. Forbes, and also a subsequent deed from W. H. Forbes to his co-defendant, B. N. Forbes. The deeds from the plaintiffs were, respectively, a deed from the widow, four separate deeds from the adult chil-

dren, and a guardian's deed from the widow as guardian for the minor children. These deeds were executed at different dates and places, and all taken together conveyed a full title to the land described therein. To the petition defendants demurred on the ground that several causes of action were improperly joined, and also that the petition did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and plaintiffs now bring the question here for reexamination. The facts as disclosed in the petition are briefly as follows: On October 1, 1875, A. R. Jeffers was the owner in fee-simple of a tract of about 310 acres in Doniphan county, Kansas, and on that day he and his wife executed a mortgage to the Phoenix Insurance Company to secure the payment of $3,300, with interest at 10 per cent. They also executed a second mortgage on the land to the defendant, W. H. Forbes, for $428. In August, 1878, A. R. Jeffers died intestate, his death being sudden and from accident, while away from home, leaving the plaintiffs as his heirs, and also leaving personal property more than enough to pay and discharge all debts against the estate, as well as all expenses of administration. Besides the above property he was also the owner at the time of his death of an unimproved tract of forty acres in Doniphan county, worth $10 per acre. Interest had been paid on the insurance company's mortgage up to April 1, 1878. The mortgaged tract had been occupied by A. R. Jeffers and his family for several years as a homestead, and continued to be so occupied by the widow and younger children after his death until the twelfth day of March, 1879, when, by fraud, fraudulent representation, threats, and duress on the part of the defendant, W. H. Forbes they were dispossessed by him. The mortgaged tract was worth at the time of the death of said A. R. Jeffers the sum of $12,380, and the annual profits were $1,500. This value continued up to the time of the execution of the deeds complained of, and was well known to the defendants.

A few weeks after the death of said A. R. Jeffers, W. H. Forbes purchased the insurance company's mortgage, representing that he was doing so as a matter of friendship for the widow and children. After obtaining possession of this mortgage, the attitude of Forbes towards the family suddenly changed. He became hostile, and demanded immediate possession of the property so mortgaged, falsely representing that

the indebtedness of the estate was many thousands of dollars more than it was two years after found to be, and that its aggregate was so great that no property, either real or personal, would be left to the widow or children. The widow being old and infirm, little versed in business matters, paralyzed, and overwhelmed with distress on account of her sudden bereavement, ignorant of her husband's real financial condition or of her rights under the law, being without means at that time to procure counsel of her own, and each and all of the children being young and unskilled in business, and fearing that defendant Forbes could and would proceed to dispossess the plaintiff and her family, and under the duress and threats of said defendant Forbes, the widow and adult children conveyed by deeds of quitclaim their interest in the mortgaged tract, and the widow was persuaded to become guardian of the minor children, and to institute and carry through proceedings in the probate court by which the interests of said minor children were also conveyed to said Forbes—the sole consideration above the mortgage debts received by said grantors being a tract of forty acres, costing $350, which said Forbes caused to be conveyed to said widow. The prayer of the petition was that all of said six deeds from the plaintiffs to W. H. Forbes, and that from W. H. Forbes to his brother, be cancelled and declared void and of no effect; that the defendant be compelled to account for the use and occupation of the lands since March 12, 1879, and for such other and further relief as might be deemed just and equitable.

The first ground of demurrer, as heretofore stated, is that several causes of action were improperly joined; and the contention is that the setting aside of each of the six several deeds from the plaintiffs to the defendant, W. H. Forbes, was a separate and independent cause of action, in which only the grantor in such deed had any interest. On the other hand, it is insisted that the plaintiffs together were the owners of a single tract; that but a single contract and agreement was entered into between them and the defendant, W. H. Forbes; that, in pursuance of such single contract and agreement, the various interests held by the several plaintiffs were conveyed to said Forbes; that if such contract and agreement was fraudulent and void, the plaintiffs had a joint interest in having it so adjudged, and all instruments executed to carry it into effect canceled and

declared null and void; and that, therefore, there was but a single cause of action, in which all the parties plaintiff were interested, and to enforce which they may unite in a single action.

We think the contention of the defendants in error is correct, and that the ruling of the district court must be sustained on this ground. Section 35 of the code prescribes the rule as to the joinder of parties plaintiff. It reads: "All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, except as otherwise provided in this article." Now, the title by which the plaintiffs held this tract was that of tenants in common. Each owned an individual interest, and his ownership was not affected in the slightest degree by the question as to who held the title of the other interests. Either owner might sell or refuse selling, and his right and title could not be abridged by any action of his co-tenants. Whatever may have been the wrong in the agreement, the transfer of title was effected only by these separate conveyances. The deed of the widow passed no title away from any of her children. That deed may stand or fall without in the least affecting any of the other conveyances. Suppose, for instance, an action was brought to set aside the widow's deed alone, can it be claimed for a moment that the children would be necessary or proper parties to such an action? Whatever the consideration received by the widow, whatever inducements she received for the execution, whatever threats or promises were made to her, they would have no right to challenge the deed, they would not be interested in having the deed set aside, they would have absolutely no right to take part in the litigation. This would be a matter concerning herself alone. If she had been wronged, she and she alone could bring an action to right that wrong, and, beyond question, they would be improper parties to such an action. If successful they would gain nothing; if unsuccessful they would lose nothing. The same may be said in reference to each of the other deeds. The grantors therein would be the only parties interested in having those deeds set aside. It is not enough under the section quoted that all the plaintiffs should have an interest in the subject of the action; it is essential that they should all have an interest in obtaining the relief demanded. But only the grantor in each deed is interested in obtaining the cancellation of that deed.

As each grantor is alone interested in obtaining the cancellation of his own deed, and as all the other plaintiffs would be improper parties in an action brought by the one alone to set aside his individual deed, so where all the parties unite in an action to have set aside six several deeds by separate grantors conveying separate interests, they unite six several causes of action in one suit, and six several causes of action in each of which only a portion of the plaintiffs in interested.

This does not assimilate an action in which the possession of the land owned in common is disturbed, for there each of the owners is alike interested in the possession. Jointly interested in the possession, they may jointly sue for any disturbance of their possession. But while jointly interested in the possession, they are not jointly interested in the title. Each owns his title separate and apart from the others—owns it absolutely and alone. The fact that they take by inheritance from a common ancestor, in no manner unifies their title. They hold by the same complete, separate, and independent title as though each had purchased his interest from a different party. Nor does the case assimilate that in which by a single instrument, as a tax or other deed, a cloud is cast upon the title to the entire tract, or one in which owners of different tracts unite in a single action to abate a common nuisance. In such cases there may be said to be a unity of action, a unity in the relief demanded, either the single cloud is to be removed from the title, or the common nuisance is to be abated. But here each party's title is affected by a separate deed executed at a different time and place, and purporting to convey only his own separate interest, and the sole relief he can obtain is the cancellation of his own deed.

Again, it is not true that there was but a single contract or agreement in reference to the transfer of this land. The petition alleges that under threats, duress, etc., as above stated, the widow made her deed, and that under like threats, duress, etc., and for the sake of saving some small pittance if they could, for their mother, the other adult plaintiffs made their deeds. So that there is, in fact, no unity either in the cause of action or in the relief demanded. In 1 Daniell's Chancery, 395, the author says: "Thus, if an estate is sold in lots to different purchasers, the purchasers cannot join in exhibiting one bill against the vendor for a specific performance; for each party's case

would be distinct, and there must be a distinct bill on each contract. Hudson v. Maddison, 12 Sim. 416; Coop. Eq. Pl. 182; Story Eq. Pl. 272, and notes." If separate vendees cannot unite in a single bill against a common vendor, neither can separate vendors unite in a single bill against a common vendee. See, further, the following authorities from this court: Harsh v. Morgan, 1 Kan. 293; Winfield Town Co. v. Maris, 11 Kan. 147; Hudson v. Atchison Co., 12 Kan. 147; Swenson v. Plow Co., 14 Kan. 388. Also the cases of Bort v. Yaw, 46 Iowa 323, and Tate v. Railroad Co., 10 Ind. 174, in which last case the court in the syllabus lays down the doctrine thus: "Two or more persons, having separate causes of action against the same defendant, though arising out of the same transaction, cannot unite; nor can several plaintiffs in one complaint demand several distinct matters of relief; nor can they enforce joint and separate demands against the same defendants."[1]

We conclude, then, that upon this ground the ruling of the district court is correct, and must be affirmed.

STROBEL v. KERR SALT COMPANY.

Court of Appeals of New York, 1900. 164 N. Y. 303.

This action was commenced in 1892 by fourteen plaintiffs who own various mills on Oatka creek, a natural stream running through the counties of Wyoming, Genesee and Monroe, against the defendant, a domestic corporation engaged in the manufacture of salt at a point on said creek above the mills of the plaintiffs, to restrain it from diverting or polluting the waters thereof. The action is for an injunction only, as the plaintiffs

1 And so in Levering v. Schell, 78 Mo. 167, (1883), denying the right of separate creditors to join in an action to set aside assignments of their respective claims to the same defendant. See also Norian v. Bennett, 179 Cal. 806, (1919), plaintiffs severally induced by fraud to purchase stock in a corporation.

2 Courts of equity in modern times frequently award damages in connection with an injunction restraining the continuance of a nuisance, but not in favor of separate property owners, Younkin v. Milwaukee Traction Co., 112 Wis. 15, (1901).

in their complaint expressly reserve "to themselves and each of them their several damages[2] * * * which they will seek to recover in several actions at law in due time to be prosecuted for that purpose." In its answer the defendant denied that it had diverted or polluted the water of the stream, except that in carrying on the business of maufacturing salt upon its own premises, it had made a reasonable use of a small portion of said water, and alleged that such use was necessary and lawful. * * *

Upon the trial, which took place about seven years after the defendant had established its plant, the conflict in the testimony was mainly confined to the degree of diminution and pollution. The amount of diminution depends largely upon the alleged return of the water to the stream after it had been converted into vapor and allowed to escape in the air. The amount of pollution depends largely upon when the samples of water, which were analyzed by chemists, were taken from the stream, as those taken in high water contained a small amount of salt when compared with those taken during low water. * * *

It was found as a conclusion of law that the plaintiffs were not entitled to any part of the relief demanded in their complaint, which was dismissed upon the merits, with costs. Upon appeal to the Appellate Division the judgment entered accordingly was affirmed without an opinion, except that one of the justices, who dissented, wrote elaborately in favor of reversal. Seven only of the plaintiffs have appealed to this court.[3]

VANN, J. * * * The question of reasonable use is generally a question of fact, but whether the undisputed facts, and the necessary inferences therefrom, establish an unreasonable use is a question of law. When the diversion, or pollution, which is treated as a form of diversion, is caused by a new and extraordinary method of using the water, hitherto unknown in the state, and such method not only permanently diverts a larger quantity of water from the stream, but also renders the rest so salt, at times, that cattle will not drink it unless forced to by necessity, fish are destroyed in great numbers, vegetation is killed and machinery rusted, such use as a matter of law is unreasonable and entitles the lower riparian owner to relief. Where the natural and necessary result of the place selected,

[3] Statement condensed and parts of the opinion omitted.

and the method adopted by an upper riparian owner in the conduct of his business is to cause material injury to the property of an owner below, a court of equity will exercise its power to restrain on account of the inadequacy of the remedy at law and in order to prevent a multiplicity of suits. The lower riparian owners are entitled to a fair participation in the use of the water and their rights cannot be cut down by the convenience or necessity of the defendant's business. "The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both." (Wheatley v. Chrisman, 24 Pa. St. 298.) * * *

The objection that the plaintiffs have no cause of action common to all, and hence that they cannot sue jointly, is unsound. While each owns a distinct piece of land situated upon a part of the stream separate from that abutted upon by the land of every other owner, they all have a common grievance against the defendant for an injury of the same kind, inflicted at the same time and by the same acts. The common injury, although differing in degree as to each owner, makes a common interest and warrants a common remedy. (Emery v. Erskine, 66 Barb. 9, 14; Reid v. Gifford, Hopkins' Ch. 416, 477; Murray v. Hay, 1 Barb. Ch. 59, 62; Blunt v. Hay, 4 Sand. Ch. 362.)[4]

It does not follow from these views that, if upon another trial the facts are unchanged, the defendant and the other salt manufacturers will be compelled to make such terms as they can, for a court of equity, with its plastic powers, can require, as a con-

[4] And so in Younkin v. Milwaukee Traction Co., 112 Wis. 15, (1901), (action by separate abutting owners to restrain unreasonable use of a street).

For the joinder of separate properly owners in an action to restrain the collecting of an illegal tax or assessment, see Michael v. St. Louis, 112 Mo. 610, (1892). In the tax cases there may be two very different questions which are sometimes confused. Each property owner may be entitled to equitable relief, so that the only question is one of joinder for convenience; or, no single property owner may be entitled to equitable relief because of the adequacy of his legal remedy, either by way of action or by way of defense to the enforcement of the tax; in such cases the real question is one of equity jurisdiction, i. e. whether the number of similar claims or defenses will justify resort to equitable remedies which would otherwise be denied. For an exhaustive discussion of the problem of equity jurisdiction to prevent a multiplicity of suits at law, see Southern Steel Co. v. Hopkins, 40 L. R. A. (N. S.) 464, (1911), annotated.

dition of withholding a permanent injunction, the construction of a reservoir on the upper sources of the stream, to accumulate water when it is plentiful for use in times of scarcity, and thus neutralize the diminution caused by the manufacture of salt. That court may also require, on the like condition, greater care in preventing the escape of salt water and salt substances into the stream, as the defendant attempted to do during the trial, and thus prevent or minimize the pollution.

The judgment of the courts below should be reversed and a new trial granted, with costs to abide the event.

Judgment reversed.

II. *Defendants.*[1]

VOORHIS v. CHILDS' EX'R.

Court of Appeals of New York, 1858. 17 N. Y. 354.

Appeal from the Supreme Court. The plaintiffs brought their action against the surviving members of the firm of Baxter, Brady, Lent & Co., and against the respondent as surviving executor of Heman W. Childs, a deceased member of said firm. The complaint alleged the making of a promissory note by the partnership in the lifetime of Heman W. Childs; its maturing and non-payment; the subsequent death of Childs; the granting of letters testamentary to the respondent as his executor, etc. It did not aver any previous suit against the surviving partners, or their insolvency. The respondent, Child's executor, demurred on the ground that the complaint did not state a cause of action against him. He had judgment for the dismissal of the complaint as against him, which having on appeal been affirmed, by the supreme court at general term in the seventh district, the plaintiffs appealed to this court.

SELDEN, J.[2] Prior to the enactment of the code of procedure There was a conflict of opinion between the courts of this state and those of England, as to the remedy allowed to the creditors of a partnership against the representatives of a deceased part-

1 See statute, ante p. 167. 2 Parts of opinion omitted.

ner. It was conceded by both that only the surviving partners could be sued at law, but it was held by the English courts that the representatives of the deceased partner might be immediately proceeded against in equity and compelled to pay the entire debts of the firm, without any previous resort to the surviving members or any evidence that such debts could not be collected from them; while on the other hand our courts held either that the remedy against the survivors must first be exhausted or it must appear that they were insolvent and unable to pay. * * *

Besides, these English decisions permitting the creditor to proceed in the first instance in equity against the estate of the deceased partner, are in conflict with the established doctrine that parties must first exhaust their legal remedies before resorting to courts of equity.

But whether these considerations are sufficient to justify the positions assumed by our courts or not, it may be regarded as having been settled in this state, prior to the code, that the creditors in such a case, could not come into a court of equity without showing, either that the surviving partners had been proceeded against to execution at law, or that they were insolvent. (Grant v. Shurter, 1 Wend. 148; Hamersley v. Lambert, 2 John. Ch. 608; Leake & Watts Orphan House v. Lawrence, 11 Paige 80; 2 Denio 577; S. C.) In the last of these cases, the English cases referred to were cited and distinctly overruled. There are many American cases, both in the State and the United States' courts supporting and confirming the doctrine of the courts of this state upon the subject. (Pendleton v. Phelps, 4 Day, 481; Remsdy v. Kane, 1 Gallis. 385; Sturges v. Beach, 1 Conn. 509; Alsop v. Mather, 8 Conn. 584; Caldwell v. Stileman, 1 Rawle, 212; Rubbell v. Perrin, 3 Ham. Ohio 287.)

The complaint in this case is in the form of an ordinary action at law upon a promissory note against all of the surviving partners, together with the executors of the deceased partner; and contains no averment that any proceedings have ever been had against any or either of the surviving partners, or that they are without the means of payment. From what has been already said, it is plain that formerly no such action could have been maintained. The question presented is, how far the code has changed the law in this respect. It cannot be claimed that it has altered the principles which govern the responsibilities of the representatives of a deceased partner for the partnership debts,

or the order of liability as between them and the surviving partners. It contains not a word indicative of such intent. The latter, therefore, are still primarily liable for the debts; and the estate of the deceased partner can only be resorted to in case of the inability of the survivors to meet them. Hence it is plain that this action cannot be sustained as a suit in equity, founded upon the ultimate liability of the representatives of Childs; because it has been shown, that in such an action it is indispensable to aver, either that the survivors have been prosecuted to execution at law, or that they are without the means of payment.

What I understand the plaintiff's counsel to claim is, that considering the suit as founded upon the legal liability of the surviving partners, the plaintiffs were warranted in making the executors parties, by section 118 of the code, which provides that, "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff; or who is a necessary party to a complete determination or settlement of the questions involved therein." This section is in terms, a mere statutory enactment of the rule as to parties which has always prevailed in courts of equity; but as it is not expressly limited to cases of that character, it has been contended, not only in this case but in others, that it is applicable to all legal as well as equitable actions.

The difference in the rule as to parties between courts of law and of equity was not accidental, but had an obvious foundation in reason. Where all persons having an interest in the controversy are made parties, cases are frequently rendered exceedingly complex. Judges can command the time and patience, and may be safely endowed with the discretion required to disentangle their intricacies and dispose of their varied equities. But it is extremely inconvenient, if not impossible, to try such cases by a jury. They are qualified to deal with simple issues only; and the rules of the common law as to parties, as well as those which prevailed in the formation of issues, were adapted to the nature of the tribunal before which the cases were to be tried. The attempt to apply the equitable rule as to parties, to all legal actions, would lead to infinite embarrassment in the trial of jury cases. If, however, the legislature had power to prescribe such a change, and has done so, the courts have no discretion in the matter, but are bound to execute the legislative will.

It is supposed by some that it was intended to abolish by the

code all distinction, not only in forms but substance, between legal and equitable actions; and it must be conceded that many of its provisions taken by themselves might seem to indicate such an intent; and yet nothing can be clearer than that the legislature has wholly failed to carry into effect such an intention if it existed. On the contrary, the code expressly retains the principal differences which distinguished the two classes of actions. Actions at law were to be tried by a jury; suits in equity by the court. This distinction remains undisturbed. In legal actions, with few exceptions, compensation in damages was the only mode of redress; while in such as were equitable the relief was such as was adapted to the exigencies of the case. The code makes no change in this respect. In one of these classes of action costs were recoverable by the successful party as a matter of course; in the other, they rested in the discretion of the court. This remains as before.

Now it is plain, that if we should make the code a consistent system, one that can be practically administered, we must construe it, not in view of the general proposition, obviously untrue, that the distinctions between actions at law and suits in equity are abolished, but in the light afforded by a comparison of its various provisions. Take, then, the case in hand. Is it reasonable, in view of the important distinctions thus made, by the code itself between legal and equitable actions, to hold that it was intended that section 118 should apply to both these classes? Let us look at some of the difficulties to which this would lead. The mode of trial depends upon the nature of the action. Those which merely seek to recover a sum of money are to be tried by a jury. The legislature was forced to adopt this provision by the constitution, which preserves trial by jury in all cases where it had theretofore existed.

If, however, the action involves anything whatever besides the recovery of money, unless it be for the recovery of specific, real or personal property, or to obtain a divorce, if it seeks the least modification of the judgment in respect to any of the parties, it then becomes triable by the court. The language of the code is, that "an issue of fact in an action for the recovery of money *only* * * * must be tried by a jury." It is easy to see, therefore, that if section 118 is to receive the construction contended for, most actions for the recovery of money, as well as actions for the recovey of specific real or personal property by

bringing in parties having some equitable interest real or supposed, in the controversy, may be readily converted into actions to be tried by the court instead of a jury. Has the legislature power thus to subvert, or enable parties to evade, an important constitutional provision? If there is any one clause of the constitution which the courts are under greater obligation to protect from all encroachment than others, it is that which preserves trial by jury; and it is clearly impossible for them, in view of their duty in this respect, so to construe the provisions of the code as to render all actions, legal as well as equitable, triable by the courts at the option of the plaintiff.

But there are other embarrassments in the way of the construction of section 118, for which the plaintiff contends, growing out of the provisions of the code in respect to costs. It will be found difficult if not impossible to reconcile that construction with those sections which give costs *of course* to the successful party in all actions for the recovery of money or of specific real or personal property. In actions of ejectment especially, where so many collateral and subordinate equities frequently exist, the task of harmonizing the equity rule as to parties with the common law rules as to costs and as to the mode of trial, would be attended with serious embarrassment.

Taking the code then, as a whole, and comparing its various provisions with each other, it seems evident that the legislature never intended section 118, to receive a construction which would authorize a suit like the present. Although all the difficulties which have been suggested, might not arise in this case, yet the section in question can only receive one of two interpretations. It must either be confined strictly to actions of an equitable[3] nature, to which alone it seems appropriate, or it must extend to actions of every kind, whether legal or equitable; and I have no hesitation in holding, for the reasons suggested, that it should be regarded as a mere statutory adoption of the equitable rule on the subject of parties, and was intended to have substantially the same application. The language of the section

[3] See Chapman v. Forbes, 123 N. Y. 532, (1890), that the provision authorizing the court to order additional parties to be brought in, is not applicable to actions at law, since in such cases the plaintiff may sue whom he pleases; if he omits to bring in a necessary party, his action may fail, but he cannot be forced to litigate with a person against his will.

itself points to this interpretation. It authorizes the bringing of all those who are *necessary* parties "to a complete determination or settlement of the questions involved." This language is inappropriate to actions for the recovery of money only, or of specific real or personal property; but embraces the very gist of the rule which has always prevailed in equitable actions.

It is worthy of remark that the construction here contended for, is that which has been of necessity to a very great extent practically put upon the various provisions of the code. Cases are found so naturally to arrange themselves according to the classification which existed prior to the code, that the distinction between legal and equitable actions, is nearly as marked upon all the papers presented to the courts as formerly. The same names are not used, but the nature of the cases has not changed, nor have the distinctions been abrogated. Very few attempts have been made to carry into practical effect the idea of blending legal and equitable causes of action in one common proceeding. Were it necessary to the decision of this case, I should be prepared to hold, that that clause of the constitution which provides, that "there shall be a supreme court having general jurisdiction in *law and equity*," presents an insuperable barrier to any legislative merger of the two jurisdictions. While the legislature may, as it has done, abolish the distinctions which existed in mere matters of form, yet it is easy to show that to blend the two in respect to matters of substance and principle, would be virtually to subvert the jurisdiction of the court in regard to the one or the other; which the legislature clearly has not the power to do. But I will not pursue this topic further, as the conclusion to which I have arrived seems to me fully warranted by the previous reasoning.

As therefore the present action must be regarded as one of a purely legal nature, brought against the surviving partners, upon their legal liability, it follows, that the executors of the deceased partner, who is liable only in equity,[4] were improperly

[4] In a number of the states there are statutes making the legal liability survive, and expressly or impliedly authorizing a joint action against the survivor and personal representative of the deceased obligor, Potts v. Daunce, 173 N. Y. 335, (1902); Mo. R. S. 1919, §§ 1160, 2156.

Where a several liability only survives, the general provision as to the joinder of defendants does not appear to authorize the joinder of the survivor with the represen-

made parties. Had the defendants united in a demurrer upon the ground that several causes of action were improperly joined, they might all perhaps have been entitled to judgment. But the demurrer is actually put in by the executors alone, and rests upon the narrower ground that the complaint does not state facts enough to constitute a cause of action against *them*.[5]

If we are right in our reasoning, the complaint is clearly defective in this respect, and the judgment of the supreme court should therefore be affirmed.

Pratt and Strong, Js., concurred in this opinion, and Denio, J., in the construction therein put on § 118 of the code. All the other judges concurred in the result upon the ground that the complaint made no cause of action against the respondent, reserving the question whether the insolvency of the surviving partners, or of the partnership estate, would justify a joint action against the survivors and representatives of the deceased partner.

Judgment affirmed.

SLUTTS v. CHAFEE.

Supreme Court of Wisconsin, 1880. 48 Wis. 617.

COLE, J. This action was commenced before a justice of the peace. The complaint was oral, and as entered in the docket of the justice was as follows: "Plaintiff complains that defendant is indebted to him in manner following: for a stove lent to defendants some time in 1870 or 1871, which stove was of the value of about $45, and which defendants have never returned to plaintiff, and refused to return it when demanded; and demands judgment, with costs."

The answer of the defendants was a general denial, and that one S. J. Plummer was a copartner with the defendants, and

tative of the deceased, Union Bk. v. Mott, 23 N. Y. 633, (1863); but see Lawrence v. Doolan, 68 Cal. 309, (1885). A joint action cannot be maintained against the administrator and the heir for the breach of a covenant of warranty by the deceased ancestor, Topico Land Co. v. Lambourn, 170 Cal. 33, (1915).

[5] See Contra Fisher v. Chadwick, 4 Wyo. 379, (1893).

should be joined[6] as a defendant in the action; also the statute of limitations. Judgment was rendered by the justice in favor of the plaintiff, and the defendants appealed the cause. At the close of the testimony in the circuit court, the defendants moved for a nonsuit, which was denied and an exception taken. The learned circuit court, among other things, charged that the action was what in law was termed an action of trover, and this charge was accepted to. There was a verdict for the plaintiff. The real question arising on the record is, whether the court below was right in treating this as an action of tort, thereby rendering the joinder of Plummer unnecessary.[7] Upon looking at the complaint, as we must do to determine this question, it seems to us it states a cause of action *ex contractu*.

The plaintiff alleges, or states, that the defendants are indebted to him for the value of the stove which he lent them, and which they have never returned. The word "indebted" is significant, for it is a legal term, having a legal meaning, and implies a debt presently payable. It is so defined by this court in Trowbridge v. Sickler, 42 Wis. 417. It seems to us that it is a forced and unnatural construction of the language of the complaint to assume or hold that it is for a wrongful conversion of the stove. Possibly the evidence introduced on the trial would sustain such an action, but that does not appear to be the gist or gravamen of the complaint; for, as we have said, the emphatic word used implies an obligation or duty springing from or arising upon contract. Great liberality in pleading is allowed in the justice's court; but surely a party ought to make it clearly manifest that he sues for a tort, when that is the cause of action. Suppose the defendants were arrested on a *ca. sa.* issued on the judgment, and imprisoned; would any court hesitate to declare such imprisonment unlawful, upon an examination of the complaint? It seems to us not. Now, if we are right in supposing the action was *ex contractu*, then it is apparent

[6] Where the defect appears on the face of the complaint, it should be reached by demurrer, and when not apparent, by answer in the nature of a plea in abatement, as in the principal case; in the absence of demurrer or answer the objection will be waived. Horstkotte v. Menier, 50 Mo. 158; Evans Brick Co. v. Hatfield, 93 Wis. 665. Where two or more are sued as joint promissors, and a several promise only is proved, the variance is fatal. Fitz v. Clark, 7 Minn. 217, (1862).

[7] For the rule in the case of tort-feasors, see note to Nichols v. Michael, post p. 228.

that Plummer should have been made a party defendant;[8] and, because he was not brought in, we think there should be a new trial. It is true, the amount involved is inconsiderable; but we cannot affirm the judgment without a violation of legal principles.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

CARMAN v. PLASS.

Court of Appeals of New York, 1861. 23 N. Y. 286.

Appeal from the Supreme Court. The action was commenced in the City Court of Brooklyn, where the plaintiff complained against the defendant, Plass, as the lessee for years of certain premises, claiming to recover $116.66, being arrears of rent due and payable March 1, 1859. The lease was averred to be by indenture between the plaintiff, of the first part, the defendant Plass, of the second part, and the defendant Mix, of the third part, executed under the respective hands and seals of the parties, whereby Plass covenanted to pay the rent required; and it was alleged that the defendant Mix, by the same indenture, did, "in consideration of the premises, and of the sum of one dollar, guarantee unto the plaintiff the payment of the aforesaid rent and the faithful performance of the covenants in the said lease contained." The complaint further set forth that Plass had made default in the payment of rent, and that the plaintiff had notified Mix, thereof, and that both defendants had failed to comply, etc. There was a general demand of judgment against both defendants.

The defendants demurred, on the ground that no cause of action against the defendants jointly was set forth in the complaint.

The city court gave judgment in favor of the defendants;

[8] When the court cannot obtain jurisdiction of one of the joint promissors, the action may properly proceed against the others, Camp. v. Gress, 250 U. S. 308, (1918).

but it was reversed on appeal at the general term of the supreme court, and judgment was rendered in favor of the plaintiff. The defendants appealed to this court.

DENIO, J. This case comes precisely within the language of section 120 of the Code of Procedure, which provides that, "persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all, or any of them, be included in the same action, at the option of the plaintiff." I see no reason to doubt that it is likewise within the meaning and intention of the enactment. It relates expressly to several and not to joint liabilities. The latter did not require the aid of a special provision; for a plurality of joint contractors always could be and generally were required to be, sued together; and provision was made in the act concerning joint debtors, for omitting to serve process on all, if the creditor should so elect. But, though this were otherwise, the provision in question, relates, in terms, to cases where a plurality of persons contract several obligations in the same instrument. That was the case here. It may be said that the cause of action is not, in this case, precisely the same against both the defendants. The lessee engaged to pay the rent unconditionally, and the surety was under no obligation until the principal had made default. But, after such default, each of them was liable for the same precise amount absolutely. They were, therefore, within the language which speaks of persons severally liable upon the same instrument. If this were otherwise doubtful, the reference to suits upon bills of exchange and promissory notes makes it entirely certain that the present case was one of those in the contemplation of the authors of the section. The parties to such paper are included in the provision. The indorsee of a bill or note, and the drawer of an accepted bill, are only liable contingently, and after being charged upon a default of the maker or acceptor. They were included in the scope of the enactment, because, though, in a general sense, parties to the paper on which their names are placed, they are not parties to the obligation, or instrument, in the same strict sense as the surety in the case under consideration. No doubt, a pretty radical innovation upon the common law system of pleading was made when, by the act of 1832 (p. 489, § 1), the several obligations of parties to a bill or a note were allowed to be enforced in a single action. But this had become familiar law when the code was

written, and it seems then to have been considered that the principle might be usefully extended to cases like the present; and the section referred to appears to me to have been framed for that purpose. I am not able to entertain any doubt respecting the correctness of the judgment of the supreme court. In the cases from 11 Howard's Practice Reports, 218, and from 10 Barb. 638, to which we have been referred, the separate undertaking of the surety was contained in a different instrument, and it was held that he could not be joined as a defendant in an action against the principal. It was assumed by the court that, in a case like the present, where both parties were bound by the same instrument, the statute would apply.

I am in favor of affirming the judgment of the supreme court.

Comstock, Ch. J., and Mason, J., dissented; all the other judges concurring.

Judgment affirmed.

MOWERY v. MAST.

Supreme Court of Nebraska, 1880. 9 Neb. 447.

Maxwell, C. J. On the fifteenth day of April, 1876, Alfred Calvert executed a note for the sum of $35 and interest to P. P. Mast & Co., due and payable at the Adams County Bank on the first day of November, 1877. Before the delivery of the note to P. P. Mast & Co., the following guaranty was written on the back of the note by Mowery, their agent: "For value received we hereby guarantee the payment of the within note, and waive protest, demand and notice of non-payment thereof. G. W. Mowery."

On the seventh day of January, 1879, an action was commenced against Calvert and Mowery before a justice of the peace, upon the note in question, and judgment rendered against them jointly for the sum of $44.62 and costs. Mowery appealed to the district court. A petition being filed in the district court praying for a joint judgment against Calvert and Mowery a demurrer was interposed by Mowery on the ground of a misjoinder of causes of action. The demurrer was overruled, and

judgment rendered against him jointly with Calvert. He brings the cause into this court by petition in error.

The only question at issue is the right of the holder of a note to bring a joint action against the maker and guarantor of a note. Section 44 of the Code of Civil Procedure provides that "persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff." This is a literal copy of section 120 of the Code of New York, as it existed prior to 1876, and has been copied in Ohio, Florida, Minnesota, Oregon, Colorado, North Carolina, South Carolina and Wisconsin. Bliss on Code Pleadings, section 94. In Kansas the words "and indorsers and guarantors" follow the words "promissory notes." Section 2550 of the Code of Iowa of 1873 provides that "when two or more persons are bound by contract or by judgment, decree or statute, whether jointly only, or jointly and severally, or severally only, and including the parties to negotiable paper, common orders and checks and sureties on the same and separate instruments, or by any liability growing out of the same, the action thereon may be brought at the plaintiff's option against any or all of them." Under these provisions it is held that the guarantor, when the guaranty is on the same paper with the original instrument, may be joined as defendant with maker. Peddicord v. Whitman, 9 Iowa 471; Marvin v. Adamson, 11 Iowa 371; Tucker v. Shiner, 24 Iowa 33; Stout v. Noteman, 30 Iowa 414; Mix v. Fairchild, 12 Iowa 351.

In Gale v. Van Arman, 18 Ohio 36, before the adoption of the Code, the supreme court held that "where a stranger to a note payable in checks, at the time of the execution, wrote on the back and signed these words, 'I guarantee the fulfillment of the within contract,' it was a joint contract, and that the parties might be sued jointly upon it," citing Leonard v. Sweetzer, 16 Ohio 1; Stage v. Olds, 12 Ohio 158; Bright v. Carpenter & Schuer, 9 Ohio 139. The decision is placed upon the ground that the instruments were executed by principal and surety at the same time, upon the same consideration, for the same purpose, and took effect from the same delivery. The dissenting opinion of Hitchcock, C. J., seems to draw the proper distinction between a guarantor and surety, which seems to have been overlooked by a majority of the court. Where the guaranty is

made at the same time with the principal contract, and becomes an essential ground of credit, there is no doubt the consideration extends to the contract of guaranty. But a contract of guaranty is not a primary obligation to pay, but is an undertaking that the debtor will pay. The contract of the maker and sureties upon a promissory note is to pay the same. The guarantor is not a promissor with the maker. How, then, can he be sued with the maker of a promissory note upon an obligation to which he is not a party? The contract of guaranty is a separate and independent contract, and the liability of the guarantor is governed by the express terms of the contract. He cannot be joined in an action against the maker of a note, he not being liable as maker.[9] Phalen v. Dinger, 4 E. D. Smith 379; Ridded v. Schuman, 10 Barb. 633; Tibbets v. Percy, 24 Barb. 39; Allen v. Fosgate, 11 How. Pr. 218; Borden v. Gilbert, 13 Wis. 670; Virden v. Ellsworth, 15 Ind. 144; Bondward v. Bladden, 19 Ind. 160. It follows that the judgment of the district court must be reversed and and the cause remanded for further proceedings.

Reversed and remanded.

PHILLIPS v. FLYNN.

Supreme Court of Missouri, 1880. 71 Mo. 424.

This was a suit for rent against defendant Blackburn. Flynn was joined as a co-defendant. The petition averred that he had purchased of Blackburn the crop raised on the demised premises; that the purchase was made with full knowledge that it had been so raised, and that plaintiff's rent was not paid, and that plaintiff was, therefore, entitled to a landlord's lien upon the crop. It further averred that Flynn had sold and shipped the crop, so that the lien could not be specifically enforced. There was a prayer for a general judgment against Blackburn, and a prayer that Flynn be required to pay plaintiff out of the proceeds of the sale the amount of such judgment. To this pe-

9 See Graham v. Ringo, 67 Mo. 324, (1878); Wolf v. Eppenstein, 71 Ore. 1, (1914).

tition Flynn filed a demurrer, which having been overruled, he refused to plead further, and after a trial and verdict against Blackburn, a judgment was entered against both, from which Flynn appealed.

SHERWOOD, C. J. The objections of the demurrant Flynn to the petition, were well taken for these reasons: 1st, The petition united in the same count two distinct causes of action, one arising *ex contractu*, the other *ex delicto*. 2d, Two distinct causes of action not belonging to the same class, were united in the petition. 3d, There was an improper joinder of parties defendant, Blackburn, who was declared against on a breach of contract, and Flynn for a tort.[10] It is unnecessary to notice the other errors assigned. Judgment reversed and cause remanded.

NICHOLS v. MICHAEL.

Court of Appeals of New York, 1861. 23 N. Y. 264.

Action to recover the possession of certain goods, upon the allegation of property in the plaintiffs, and a joint detention by the defendants.

In April, 1853, the defendant Pinner purchased of the plaintiffs, the goods described in the complaint (the purchase amounting to $6,500), on a credit of four and six months, for which he gave his two negotiable promissory notes. Pinner continued in business until the August following when he failed, and made an assignment to the defendant Michael, for the benefit of his creditors, giving preferences. This action was brought to recover the possession of those goods, alleging they were fraudulently obtained. The judgment from which this appeal was brought, was obtained on a second trial. * * *

The jury found a verdict for the plaintiffs for the possession of the property, and assessed the value thereof and damages for

10 And so in Parker v. Rodes, 79 Mo. 88, (1883). But see Ehlers v. Automobile Liability Co., 166 Wis. 185, (1917), allowing a joint action against the operator of an automobile for a negligent injury and the bonding Co. on the statutory bond. This ruling was based on the 1915 amendments to the Wisconsin Code.

their detention—the property having been delivered to the defendant Michael. Judgment was entered for the plaintiffs, which was affirmed on appeal at general term in the eighth district.

James, J.[1] Whenever property is obtained from another upon credit, with the preconceived design on the part of the purchaser to cheat and defraud the vendor out of the same, the vendor, upon the discovery of the fraud, may avoid the contract and retake the property, unless it has passed to the possession of a *bona fide* holder for value. Such, I understand, was the conclusion of the court when this case was formerly before it. (18 N. Y. 295; Hall v. Naylor, 18 N. Y. 588.) * * *

Michael having the goods in possession was not only a proper but a necessary party defendant. But it was insisted that Pinner was improperly made a party, and that under the Code the action for the recovery of the possession of personal property can only be maintained against one who had in fact or in law the possession, control or title at the time of its commencement.

Formerly, the action of detinue was the proper action where there was a wrongful detainer (2 Saund. 84). There are some *dicta* in the books, that this action would not lie unless the defendant was in possession (Bul. N. P. 51; 1 Selw. N. P. 546); but that was not so. The defendant was liable in the action, though he had delivered possession to another before action brought. (Comyn's Dig. A.; Jones v. Dowle, 9 M. & W. 19; Garth v. Howard, 5 C. & P. 346.) In Jones v. Dowle, Parke, B., stated the rule to be "that detinue does not lie against one who never had possession of the chattel, but does against him who once had, but has improperly parted with it." And Chitty says, "if he wrongfully delivered the goods to another he is liable; and I think the true rule was, that detinue would lie wherever the defendant had been in possession, whether he retained it or had wrongfully parted with it." In this State the action of detinue was abolished by the Revised Statutes, and that of replevin extended so as to serve all the purposes of both actions, and under that statute the action of replevin would lie, although the defendant had parted with the property. (2 R. S. 532, secs. 11, 19; 22 Wend. 602.) * * *

[1] Parts of the opinion and concurring opinion of Selden, J. omitted.

In this view of the case, an action properly laid against Pinner, notwithstanding he had assigned and delivered the property to Michael. He had fraudulently obtained the property and had it in his possession, and wrongfully parted with it. Michael was not a *bona fide* purchaser; the property was in his custody as trustee, for the benefit of Pinner's creditors, Pinner having an interest in the residuum after paying his debts. Here was such a connection as would sustain a joint action against the defendants. Pinner had fraudulently obtained the goods and wrongfully transferred them to Michael to dispose of them as his trustee; Michael had the possession and refused to surrender it on demand. The Code provides that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein. (Sec. 118.) Both these defendants claim an interest in the goods adverse to the plaintiffs; Pinner claiming that the purchase of the goods was free from fraud, and that they should be retained by his assignee, and disposed of for the benefit of creditors—Michael claiming the possession for the same purpose, and refusing to surrender on demand. They were properly joined as defendants.

I have been unable to discover any error which calls for a reversal of this case, and the judgment should therefore be affirmed, with costs. * * *

SELDEN, J. * * * The theory upon which these cases[2] proceed is perfectly sound, and applies directly to the present case. It is, that where a person is in possession of goods belonging to another, which he is bound to deliver upon demand, if he, without authority from the owner, parts with that possession to one who refuses to deliver them, he is responsible in detinue equally with the party refusing. He contributes to the detention. It is the consequence of his own wrongful delivery. The action in such cases may properly be brought against both; because the acts of both unite in producing the detention.

It does not affect the principle, that Pinner in this case came to the possession of the goods by delivery, and under the former purchase, and not as a trespasser. If they were fraudulently

[2] In the omitted part of the opinion, Selden, J., reviewed Garth v. Howard, 5 C. & P. 346, and Jones v. Dowle, 9 M. & W. 19.

obtained, he had no right to retain possession for one moment as against the plaintiffs, and could transfer no such right to his assignee. The action proceeds, not upon the ground of a tortious taking, but of a wrongful detention; and to this, Pinner has contributed by placing the goods in the possession of the defendant Michael, who refused to deliver them.[3] The case cannot be distinguished in principle from the two English cases, to which I have referred. * * *

Judgment affirmed.

TROWBRIDGE v. FOREPAUGH.

Supreme Court of Minnesota, 1869. 14 Minn. 133.

Appeal from an order of the court of common pleas, Ramsey county, sustaining a demurrer to the complaint.

The action is against Joseph L. Forepaugh, and Monroe and Romaine Shiere, and the city of St. Paul, for an injury caused by plaintiff falling into a hole on Third Street, in St. Paul, across the front of defendant Forepaugh's lot. The complaint alleges the excavation of the hole by the defendants Forepaugh and the Shieres, and that they willfully and negligently left it open without protection or notice, and that plaintiff fell into it and was injured. It alleges the duty of the city to keep the streets and sidewalks in repair, free from obstructions, and in suitable condition for use and travel, notice to it, and that it

[3] The same rule applies in an action for conversion, Ess v. Griffith, 128 Mo. 50, (1895). In general the liability of joint tort-feasors is joint and several, thus permitting a joint or a separate action at the option of the plaintiff. Bigelow v. Old Dominion Copper Co., 225 U. S. 111, and this rule applies to the case of partners, Bretherton v. Wood, 3 Brod. & Bing. 54 (1821): Creed v. Hartman, 29 N. Y. 59, (1864); and to the case of co-owners of trespassing animals, Brady v. Ball, 14 Ind. 317, (1860). In the case of common law torts by a married woman the liability of husband and wife appears to be joint only, so as to preclude a separate action against either during coverture, Flesh v. Lindsey, 115 Mo. 1, (1893).

Under modern statutes a married woman may commit some tort for which she alone is liable, Baum v. Mullen, 47 N. Y. 577, (1872).

suffered the hole to remain without protection or notice. The defendants, other than the city, demurred for an improper joinder of causes of action.

WILSON, C. J. The liability of the city depends on a state of facts not affecting its co-defendants; and the converse. Neither is in fact nor in law chargeable with, or liable on account of, the matter set up as a cause of action against the other. They did not *jointly* conduce to the injury by any acts either of omission or commission.

Under such circumstances we find no case holding that a *joint* action is maintainable; and we are of the opinion that it is unauthorized by any statute or legal principle.[4] Our statute, which is merely declaratory of the common law, forbids the joinder of causes of action, which do not affect all the parties to the action. Gen. Sts. c. 66, § 98. For such improper joinder of causes of action any defendant may demur. There is nothing in the statute, and we discover no reason, requiring all the defendants to join in such a demurrer.

Order affirmed.

COOPER v. BLAIR.

Supreme Court of Oregon, 1886. 14 Ore. 255.

THAYER, J.[5] The appellant commenced an action in the court below against the respondents to recover damages for an alleged conversion of a quantity of wheat which the appellant had stored with the respondent Blair at Corvallis, Benton County, Oregon. Blair had two warehouses, in which he received wheat for storage, and dealt in buying and selling wheat. He received

[4] Acc: Mineral City v. Gilbow, 81 Ohio St. 263, (1909). But see Fortmeyer v. Natl. Biscuit Co., 116 Minn. 158, 37 L. R. A. (N. S.) 569, (1911), annotated, disapproving the principal case and sustaining the joinder of the city and the property owner whom it had permitted to maintain an opening in the sidewalk.

There are statutes in several states not only permitting, but requiring the joinder of the property owner as a defendant in action against the City for injuries due to the condition of the sidewalk, which both the property owner and the city were bound to keep in repair.

[5] Parts of the opinion omitted.

from appellant 833 bushels, Oct. 25, 1882, at his warehouse, on First Street, Corvallis; 416 7/60 bushels, at same warehouse, Sept. 19, 1885; and at or about that time received from him 716 46/60 bushels at same warehouse. A part of the wheat so stored the appellant subsequently sold to Blair. He alleges that he had 1,365 bushels and some pounds of wheat after the sale to Blair, which he charged the respondents with having converted. The respondents, the Salem Capitol Flouring-mill Company, Limited, J. E. Henkle, Jacob Henkle, and John Kitson, and W. B. Hamilton, Zephin Job, and B. R. Job, answer separately; that is, the flouring-mills company filed its answer; the Henkles and Kitson, who were partners, filed their answer jointly; and Hamilton and Zephin and B. R. Job, who were also partners, filed their answer jointly. The said respondents in their said several answers denied the main allegations of the complaint, and set up certain new matter. The flouring-mills company alleged that they purchased and paid full cash value for all of the wheat they received, or that came into their possession, at or about the time of the alleged conversion. Henkle & Co. alleged that they were the owners of a quantity of wheat which had been stored in said warehouse; that it was mixed in bins with other wheat of like grade and quality, with the assent of the owners thereof; and that they took only 2,800 bushels of wheat, which was a less amount than that stored therein belonging to them, and which was delivered to them by said Blair. And Hamilton & Co. alleged that they were the owners of about 13,132 bushels of wheat, which had theretofore been stored in said warehouse, mixed as Henkle & Co.'s wheat was, and that Blair delivered the same to them; which wheat, so received by the respondents, was alleged in the several answers to be the wheat they were charged with having converted. The said Blair filed no answer to the complaint.

Upon the trial of the action the respondents' counsel contended that there could be no recovery against the respondents unless the alleged conversion of the wheat was their joint act, and the circuit judge who presided at the trial seemed to be of that opinion, as he finally non-suited the appellant apparently upon the ground that the respondents' acts in the premises were several; that is, the flouring mills company acted for themselves; Henkle & Co. for themselves, and Hamilton & Co. for themselves. The theory of the appellant's counsel seems to have

been that they had a right, after proving the amount of wheat appellant had in the warehouse at the time of the alleged conversion, to show how much the flouring mills company took out of it, how much Henkle & Co. took out of it, and how much Hamilton & Co. took out of it; and, after ascertaining what portion of the wheat so taken belonged to him, recover from said several companies the amount taken by them, respectively, of his wheat.

It must be conceded, I think, that these several companies acted independently of each other in what they did in regard to the taking of the wheat. There is not the slightest trace of testimony in the case, as I can discover, that they combined or cooperated in taking away any wheat from the warehouse in question. The taking was at different times, and was clearly several acts, and resulted from their several motives. Each company took the wheat they supposed they were severally entitled to, and at their own instance, and upon their own responsibility; and, unless the appellant's counsel can maintain the theory before indicated, the non-suit granted by the circuit judge must stand. There were a number of exceptions taken to the ruling of the judge at the trial in excluding testimony offered upon the part of the appellant; but they are unimportant, unless the appellant had the right to recover severally against the respondents, as before indicated.

The view the appellant's counsel suggested in reference to this question seems hardly tenable; yet it has been presented with much force and ability, and is sustained by many of the earlier decisions. Jackson v. Woods, 5 Johns. 278, and cases there cited. That was a case of ejectment against five defendants, who entered into the consent rule jointly, and pleaded jointly. * * *

These two cases have been referred to in subsequent decisions of the New York courts, but have never been cited except in ejectment proceedings as they were conducted at common law; and all that is said by the court in either of them is only authority in ejectment suits as formerly prosecuted. * * *

Chitty says: "And, if a joint action of trespass be brought against several persons, the plaintiff cannot declare for an assault and battery by one, and for the taking away of goods by the others, because these trespasses are of several natures. And in trover against several defendants all cannot be found guilty

in the same court [count?] without proof of a joint conversion by all." 1 Chit. Pl. 86. And it is declared in note "i" to the case of Wilbraham v. Snow, 2 Saund. Pt. 1 p. 47, in these words: "It is plain that several defendants cannot be found guilty in trover without evidence of a joint conversion. Therefore, where bankrupts and their assignees were joined as defendants in an action of trover, and a verdict passed against all the defendants upon evidence that the bankrupts, before their bankruptcy, had converted the goods of the plaintiff by pledging them without authority, and that the assignees, after the bankruptcy, had refused to deliver them up on demand, the court held that the conversions were separate, and granted a new trial for want of evidence of a joint conversion;" citing Nicholl v. Glennie, 1 Maule & S. 588. In Add. Torts, § 1321, the same rule is declared, and same reference made to 1 Maule & S. 588. The author further remarks in that section that, "where an action has been brought against several joint trespassers, the evidence must be confined to the joint offenses in which all are implicated." Mr. Pomeroy in his work on Remedial Rights and Remedies, in section 308, after stating, in the previous section, that those who have united in the commission of a tort to the person or the property, whether the injury be done by force, or be the result of negligence or want of skill or of fraud and deceit, are generally liable to the injured party without any restriction or limit upon his choice of defendants against whom he may proceed, says: "In order, however, that the general rule thus stated should apply, and a union of wrongdoers in one action should be possible, there must be some community in the wrongdoing among the parties who are to be united as co-defendants. The injury must in some sense be their joint work. It is not enough that the injured party has, on certain grounds, a cause of action against one for the physical torts done to himself or his property, and has, on entirely different grounds, a cause of action against another for the same physical tort. There must be something more than the existence of two separate causes of action for the same act or default to enable him to join the two parties liable in the single action." This principle, he there says, is of universal application. In Forbes v. Marsh, 15 Conn. 384, the court held that, "where the plaintiff in an action of trover against B and C, introduced evidence proving a conversion by B only, without the

participation or knowledge of C, that it was not then competent to prove a distinct conversion by C."

This was the predicament the appellant found himself in at the trial of this case. He had joined the three parties, the flouring-mills company, Henkle & Co., and Hamilton & Co., in a single action, and then attempted to introduce evidence proving a conversion by one of them only. He could only be permitted to prove an act of conversion upon the part of one of the parties under an offer to show that the others participated in the act in some way; and, unless he could make such showing, he would be confined to his claim against the one party. Or he might have been permitted to show that all the parties took and carried away the wheat at different times, under an offer to show that there had been a combination entered into between them for that purpose; and, if he failed to show the common purpose, he would have had to submit to a non-suit unless the court permitted him to amend his complaint, and proceed against one of the parties. Section 99 of the Civil Code is broad enough, I think, to have allowed such an amendment; but to attempt to proceed against the respondents jointly on account of a several liability is not warranted by law in such a case as this was. We virtually held that in Dahms v. Sears, 11 Pac. Rep. 891 (recently decided by this court). The difficulty in this class of cases has been in attempting to apply the general rule that torts are joint and several, and that in a joint action against several defendants one or more may be found guilty, and the others acquitted; but in the class of cases to which that rule applies, as was said by Judge Dillon, in Turner v. Hitchcock, 20 Iowa 316, the injury sued for is an entirety. "The injury is single, though the wrongdoers may be numerous." It has no application to a case where distinct injuries have been committed by the several defendants. If B were to go to A's barn, and unlawfully carry away 10 bushels of his wheat, and C, in like manner, were to go at another time, and carry away 30 bushels more, and there had been no concert of action between them in the matter, but each had acted for himself, it would be absurd to sue them together in one action for the conversion of the amount of wheat so taken. Yet this is the position the appellant occupies in the case at circuit, and he either had to confine his proof to one of the acts, and to the party committing it, or obtain leave of the court to amend his complaint after the

proof disclosed the dilemma he was in, or submit to a nonsuit. There could have been only one recovery in the case, and that had to be against the party or parties who did the act for which it was obtained.[6] * * *

Judgment affirmed.

SIMMONS v. EVERSON.

Court of Appeals of New York, 1891. 124 N. Y. 319.

Appeal from a judgment of the general term of the fourth judicial department, affirming a judgment entered on the decision of the circuit court.

The trial court found that for many years prior to October 18, 1887, the appellants owned in severalty, three lots, each being 22 feet wide, and bounded on the east by the center line of South Salina street in the city of Syracuse. The south lot was owned by the defendant Lynch, the middle one by the defendant Pierce, and the north one by the defendant Everson. On these lots stood three brick stores, separated from each other by brick partition walls extending from the foundations to the roofs. A continuous brick wall of uniform height (about sixty feet) and thickness stood adjacent to the west line of the street, and formed the front of the buildings. The partition walls and the front wall were interlocked, or built together. On the date mentioned the three stores were substantially destroyed by fire, nothing being left standing except the front wall, a part of the partition walls, and a small part of the woodwork in the front of Everson's building. Shortly after this event the front wall began to lean towards the street, and continued to incline more and more in that direction until Nov. 17, 1887, when it gave way near the point where it was united with the partition wall between the buildings of Lynch and Pierce, carrying down the entire front and part of both partition walls. Material from

[6] See also Cogswell v. Murphy, 46 Ia. 44 (1877), separate owners of trespassing animals; Chipman v. Palmer, 77 N. Y. 51, (1879), pollution of a stream by several acting independently; O'Brien v. Fitzgerald, 143 N. Y. 377, directors of a corporation, charged with separate acts of negligence and mismanagement.

the part of the front wall, standing on the lots of Pierce and Everson, and from their partition wall fell on and killed the plaintiff's intestate, who was lawfully on the sidewalk near the boundary between their properties. No part of the walls on Lynch's lot fell on decedent. It was found that immediately after the fire the front and part of the partition walls became weak, unsafe, dangerous, and liable to fall into the street, and that each of the defendants was careless and negligent in not removing or supporting the walls on his own lot, and that the several neglects of the defendants united and directly caused the walls to fall. It was further found that these walls were so unsafe that they were a public nuisance, and also that the decedent did not negligently contribute to the accident or to his own death. The damages were assessed at $5,000.

FOLLETT, C. J. (after stating the facts as above): It is urged in behalf of the defendants that at most this is but a case of several independent acts of negligence committed by each, the joint effect of which caused the accident, and for which they are not jointly liable within the rule laid down in Shipman v. Palmer, 77 N. Y. 51. The case at bar does not belong to the class of actions arising out of acts or omissions which are simply negligent,[7] and, while the defendants did not intend by their several acts to commit the injury, their conduct created public nuisance, which is an indictable misdemeanor under the statutes of this state (Pen. Code, §§ 385, 387; Vincent v. Cook, 4 Hun. 318;) and at common law (Reg. v. Watts, 1 Salk. 357; Reg. v. Watson, 2 Ld. Raym. 856; 1 Russ. Crimes, 5th edition 423; 2 Whart. Crim. Law, § 1410; Bigelow, Torts 237; Pol. Torts, 2nd ed. 345; Steph. Dig. Crim. Law, art. 176; Indian P. C. § 268). Persons who by their several acts or omissions maintain a public or common nuisance are jointly and severally liable for such damages as are the direct, immediate, and probable consequence of it. Irvine v. Wood, 51 N. Y. 224, 230; Slater v. Merscreau, 64 N. Y. 138; Timlin v. Oil Co., 7 N. Y. Supp. 158; Klauder v.

[7] See Colgreve v. Ry., 20 N. Y. 492, (1859), railroad accident caused by the independent negligence of two railroads using the same track:

Compare Lull v. Fox River Imp. Co. 19 Wis. 100, (1865) where defendants independently obstructed a stream.

For the joinder of the manufacturers and sellers of defective and dangerous articles, see Clement v. Crosby, 10 L. R. A. (N. S.) 588.

McGrath, 35 Pa. St. 128; 1 Shear & R. Neg. (4th ed.) § 122; Pol. Torts, (2nd ed.) 356. The fall of these four-story brick walls, into the street was the direct and immediate consequence of the several acts of the defendants in suffering the portions standing on their own lots to remain unsupported after they had begun visibly to incline towards the street, and it was as obvious before, as it was after the accident, that if any part of the front wall fell, a large part of it must, and that it would go into the street. The judgment should be affirmed, with costs. All concur, except VANN, J., not voting.

GREENBERG v. WHITCOMB LUMBER CO.

Supreme Court of Wisconsin, 1895. 90 Wis. 225.

The defendants separately demurred to the complaint on the grounds of misjoinder of causes of action, and failure to state facts, sufficient, etc. The court sustained the demurrer of the defendant Semple and overruled the demurrer of the defendant Whitcomb Lumber Co.[8]

NEWMAN, J.: The complaint states, in substance, that the defendant the Whitcomb Lumber Company is a corporation; that the defendant Parlan Semple was one of its officers and its general managing agent; that its business was the manufacturing of timber into firewood; that it operated, in this work, a machine which was defective and dangerous; that it knew the machine to be defective and dangerous; that the defect which rendered it dangerous was that the saw was defectively and insecurely fastened to its shaft; that the plaintiff was employed to work upon or with this machine; that he was inexperienced in such work and as to such machine, and did not know of the defect of the machine; that the defendants knew that he was so inexperienced and ignorant; that plaintiff received no instructions; that he was injured, without his fault, by reason of the defect of the machine. Fairly construed, this is the substance of the complaint. It was the duty of the defendant the Whitcomb Lumber Company to furnish the plaintiff a safe machine

8 Statement condensed.

to work with, and knowing the defect of the machine and that he was inexperienced, to instruct him of the dangers of the employment. Not to do this was negligence. The complaint states a cause of action against the defendant the Whitcomb Lumber Company.

Whether the complaint states a cause of action against the defendant Parlan Semple is more complex. He was the agent or servant of the Whitcomb Lumber Company, charged with the oversight and management of its operations, and with the duty of providing a safe machine for the work in which the plaintiff was engaged. The principle is well settled that the agent or servant is responsible to third persons only for injuries which are occasioned by his misfeasance, and not for those occasioned by his mere non-feasance. Some confusion has arisen in the cases, from a failure to observe clearly the distinction between non-feasance and misfeasance. These terms are very accurately defined, and their application to questions of negligence pointed out, by Judge Metcalf in Bell v. Josselyn, 3 Gray (Mass.) 309. "Non-feasance," says the learned judge, "is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; malfeasance is the doing of an act which a person ought not to do at all." The application of these definitions to the case at bar is not difficult. It was Semple's duty to have had this machine safe. His neglect to do so was non-feasance. But that alone would not have harmed the plaintiff, if he had not set him to work upon it. To set him to work upon this defective and dangerous machine, knowing it to be dangerous, was doing improperly an act which one might lawfully do in a proper manner. It was misfeasance. Both elements, non-feasance and misfeasance, entered into the act, or fact, which caused the plaintiff's damages. But the non-feasance alone could not have produced it. The misfeasance was the efficient cause. For this the defendant Semple is responsible to the plaintiff. Mechem, Ag. sec. 569 *et seq.;* 14 Am. & Eng. Enc. Law 873, and cases cited in note 4; Wood Mast. & Serv. (2d Ed.) 667; Osborn v. Morgan, 130 Mass. 102. The complaint states but a single cause of action. It is the same cause of action against both defendants, arising from the same acts of negligence,—the master for the negligence of its servant; the servant for his own misfeasance. Both master and servant, being liable for the same acts of negligence,

may be joined as defendants.[9] Wood, Mast. & Serv., *supra;* Wright v. Wilcox, 19 Wend. 343; Phelps v. Wait, 30 N. Y. 78. The order appealed from by the Whitcomb Lumber Company is affirmed, and the order appealed from by the plaintiff is reversed.

SHIELDS v. BARROW.

Supreme Court of United States, 1854. 17 Howard 130.

CURTIS, J., delivered the opinion of the court.

To make intelligible the questions decided in this case, an outline of some part of its complicated proceedings must be given. They were begun by a bill in equity, filed in the circuit court of the United States for the eastern district of Louisiana, on the 19th of December, 1842, by Robert R. Barrow, a citizen of the state of Louisiana, against Mrs. Victoire Shields, and by amendment against William Bisland, citizens of the State of Mississippi. The bill stated, that in July, 1836, the complainant sold certain plantations and slaves in Louisnana, to one Thomas R. Shields, who was a citizen of Louisiana, for the sum of $227,000, payable by installments, the last of which would fall due in March, 1844.

That negotiable paper was given for the consideration money,

9 Acc: Mayburg v. North Pac. Ry. Co., 100 Minn. 79, (1907), 12 L. R. A. (N. S.) 675, annotated case.

But see French v. Central Construction Co., 76 Ohio St. 509, (1907), 12 L. R. A. (N. S.) 669, annotated, refusing to apply the rule to a case where the liability of the master rested solely on the doctrine of respondeat superior.

Where the joinder is proper under the state practice, the joinder of a resident employee with a non-resident employer, will prevent the removal of the case against the latter to the Federal Court as a separable controversy, and the mere fact that the joinder may have been made to prevent removal will not make it fraudulent, C. R. I. & P. Ry. v. Dowdell, 229 U. S. 102 (1912).

See also, McAllister v. C. & O. Ry. Co., 243 U. S. 302, (1917), where a statute was construed as imposing a joint liability on the lessor and the lessee for the torts of the latter.

For a case of fraudulent joinder to prevent removal, see Wecker v. Natl. Enameling Co., 204 U. S. 176, (1907).

and from time to time $107,000 was paid. That the residue of the notes being unpaid, and some of them protested for non-payment, a judgment was obtained against Thomas R. Shields, the purchaser, for a part of the purchase-money, and proceedings instituted by attachments against Thomas R. Shields and William Bisland, one of his indorsers, for other parts of the purchase-money then due and unpaid. In this condition of things, an agreement of compromise and settlement was made, on the 9th day of November, 1842, between the complainant, of the first part, Thomas R. Shields, the purchaser, of the second part, and six indorsers on the notes given by Thomas R. Shields, of the third part. Of these six indorsers, Mrs. Shields and Bisland, the defendants were two. By this new contract, the complainant was to receive back the property sold, retain the $107,000 already paid, and the six indorsers executed their notes, payable to the complainant, amounting to thirty-two thousand dollars, in the manner and proportions following, as stated in the bill:

"The said William Bisland pays ten thousand dollars, in two equal instalments, the first in March next, and the other in March following, for which sum the said William Bisland made his two promissory notes, indorsed by John P. Watson, and payable at the office of the Louisiana Bank in New Orleans. The said R. G. Ellis $6,966.66, on two notes indorsed by William Bisland. The said George S. Guion, $2,750, on two notes indorsed by Van P. Winder. The said Van P. Winder, $2,750, on two notes indorsed by George S. Guion. The said William B. Shields, $4,766.66, on two notes indorsed by Mrs. Victoire Shields; and finally, Mrs. Victoire Shields the same amount on two notes payable as aforesaid at the office of the Louisiana Bank, in New Orleans."

The complainant was to release the purchaser, Thomas R. Shields, and his indorsers, from all their liabilities then outstanding, and was to dismiss the attachment suit then pending against Thomas R. Shields and Bisland.

The bill further alleges, that though the notes were given, and the complainant went into possession under the agreement of compromise, the agreement ought to be rescinded, and the complainant restored to his original rights under the contract of sale; and it alleges various reasons therefor, which it is not necessary in this connection to state. It concludes with a prayer

that the act of compromise may be declared to have been improperly procured, and may be annulled and set aside, and that the defendants may be decreed to pay such of the notes, bearing their indorsement, as may fall due during the progress of the suit, and for general relief.

Such being the scope of this bill and its parties, it is perfectly clear that the circuit court of the United States for Louisiana, could not make any decree thereon. The contract of compromise was one entire subject, and from its nature could not be rescinded, so far as respected two of the parties to it, and allowed to stand as to the others. Thomas R. Shields, the principal, and four out of six of his indorsers, being citizens of Louisiana, could not be made defendants in this suit; yet each of them was an indispensable party to a bill for the rescission of the contract. Neither the act of congress of February 28, 1839, 5 Stats. at Large 321, section 1, nor the 47th[10] rule for the equity practice of the circuit courts of the United States, enables a circuit court to make a decree in equity, in the absence of an indispensable party, whose rights must necessarily be affected by such decree.

In Russell v. Clarke's Executors, 7 Cranch 98, this court said: "The incapacity imposed on the circuit court to proceed against any person residing within the United States, but not within the district for which the court may be holden, would certainly justify them in dispensing with parties merely formal. Perhaps in cases where the real merits of the cause may be determined without essentially affecting the interests of absent persons, it may be the duty of the court to decree, as between the parties before them. But, in this case, the assignees of Robert Murray and Co. are so essential to the merits of the question, and may be so much affected by the decree, that the court cannot proceed

[10] Rule 47 has been slightly amended and now appears as Rule 39, Equity Rules, 1912 198 Fed. XXIX:

"In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

to a final decision of the cause till they are parties."

The court here points out three classes of parties to a bill in equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

A bill to rescind a contract affords an example of this kind. For, if only a part of those interested in the contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside, and the contracting parties restored to their former condition, as to the others. We do not say that no case can arise in which this may be done; but it must be a case in which the rights of those before the court are completely separable from the rights of those absent, otherwise the latter are indispensable parties.

Now it will be perceived, that in Russell v. Clark's Executors, this court, after considering the embarrassments which attend the exercise of the equity jurisdiction of the circuit courts of the United States, advanced as far as this: They declared that formal parties may be dispensed with when they cannot be reached; that persons having rights which must be affected by a decree, cannot be dispensed with; and they express a doubt concerning the other class of parties. This doubt is solved in favor of the jurisdiction in subsequent cases, but without infringing upon what was held in Russell v. Clarke's Executors, concerning the incapacity of the court to give relief, when that relief necessarily involves the rights of absent persons. As to formal or unnecessary parties, see Wormley v. Wormley, 8 Wheat. 451; Carneal v. Banks, 10 ibid. 188; Vattier v. Hinde,

7 Pet. 266. As to parties having a substantial interest, but not so connected with the controversy that their joinder is indispensable, see Cameron v. M'Roberts, 3 Wheat. 591; Osborn v. The Bank of the United States, 9 ibid. 738; Harding v. Handy, 11 ibid. 132. As to parties having an interest which is inseparable from the interests of those before the court, and who are, therefore, indispensable parties, see Cameron v. M'Roberts, 3 ibid. 591; Mallow v. Hinde, 12 ibid. 197.

In Cameron v. M'Roberts, where the citizenship of the other defendants than Cameron did not appear on the record, this court certified: "If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in Cameron, so that substantial justice (so far as he was interested) could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone." And the grounds of this distinction are explained in Mallow v. Hinde, 12 Wheat. 196, 198.

Such was the state of the laws on this subject when the act of congress of February 28, 1839, 5 Stats. at Large 321, was passed, and the 47th rule, for the equity practice of the circuit court of the United States, was made by this court.

The first section of that statute enacts: "That when in any suit, at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within, the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit."

This act relates solely to the non-joinder of persons who are not within the reach of the process of the court. It does not affect any case where persons, having an interest, are not joined because their citizenship is such that their joinder would defeat the jurisdiction; and, so far as it touches suits in equity, we understand it to be no more than a legislative affirmance of the rule previously established by the cases of Cameron v. M'Rob-

erts, 3 Wheat. 591; Osborn v. The Bank of the United States, 9 ibid. 738; and Harding v. Handy, 11 ibid. 132. For this court had already there decided, that the non-joinder of a party who could not be served with process, would not defeat the jurisdiction. The act says, it shall be lawful for the court to entertain jurisdiction; but, as is observed by this court, in Mallow v. Hinde, 12 Wheat. 198, when speaking of a case where an indispensable party was not before the court, "we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."

So that, while this act removed any difficulty as to jurisdiction, between competent parties, regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned. And the 47th rule is only a declaration, for the government of practitioners and courts, of the effect of this act of congress, and of the previous decisions of the court, on the subject of that rule. Hagan v. Walker, 14 How. 36. It remains true, notwithstanding the act of congress and the 47th rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights. To use the language of this court, in Elmendorf v. Taylor, 10 Wheat. 167: "If the case may be completely decided, as between the litigant parties, the circumstances that an interest exists in some other person whom the process of the court cannot reach,—as if such party be a resident of another State,—ought not to prevent a decree upon its merits." But if the case cannot be thus completely decided, the court should make no decree.

We have thought it proper to make these observations upon the effect of the act of congress and of the 47th rule of this court, because they seem to have been misunderstood, and misapplied in this case; it being clear that the circuit court could make no decree, as between the parties originally before it, so as to do complete and final justice between them without affect-

ing the rights of absent persons, and that the original bill ought to have been dismissed.[1]

EASTERLY v. BARBER.

Court of Appeals of New York, 1876. 66 N. Y. 433.

In the court below the plaintiffs recovered from the defendant as a co-surety one-half of the amount which he had been compelled to pay, on proof that the other sureties, who were not parties to the action, were insolvent.[2]

MILLER, J.: * * * Other questions arise upon the defendant's appeal, which should be considered. It is claimed that an action at law by a surety for contribution must be against each of the sureties separately for his proportion, and that no more can be recovered, even where one or more are insolvent. In the latter case, the action must be in equity against all the co-sureties for contributions, and, upon proof of the insolvency of one or more of the sureties, the payment of the amount will be adjudged among the solvent parties in due proportion. The principle stated is fully sustained by the authorities. It is thus stated, in Parsons on Contracts (vol. 1, page 34): "At law, a surety can recover from his co-surety in aliquot part, calculated upon the whole number, without reference to the insolvency of others of the co-sureties; but in equity it is otherwise."

[1] For the same reason as in the principal case, all persons interested are necessary to a will contest, Reformed Church v. Nelson, 35 Ohio St. 638; Wells v. Wells, 144 Mo. 198, (1898).

In other cases the decree might be futile or unjust unless all persons interested were bound, as in suits for partition, Dameron v. Jamison, 71 Mo. 97, (1879).

Or in suits to foreclose a mortgage without joining all of the heirs of a deceased mortgagor, Pillow v. Sentelle, 39 Ark. 61, (1882). But foreclosure may be made subject to prior incumbrances, and hence the holder of a prior mortgage is not indispensable, Hagan v. Walker, 14 Howard 29, (1852).

In other cases the decree would leave the defendant exposed to double liability or possible injustice, as in a creditor's suit to set aside a fraudulent conveyance without making the debtor a defendant, Chadbourne v. Coe, 51 Fed. 479, (1892).

[2] Statement condensed and part of the opinion omitted.

(See, also, Browne v. Lee, 6 Barn. & Cress, 689; 13 Eng. C. L. 394; Cowell v. Edwards, 2 B. & Pull. 268; Beaman v. Blanchard, 4 Wend. 432, 435; Story's Eq. Juris. § 496; 1 Chitty on Con. (5th Am. Ed.) 597, 598; Willard's Eq. Juris. 108). There seems to be a propriety in the rule that where sureties are called upon to contribute, and some of them are insolvent, that all the parties should be brought into court and a decree made upon equitable principles in reference to the alleged insolvency. There should be a remedy decreed against the insolvent parties, which may be enforced if they become afterwards able to pay, and this can only be done in a court of equity and when they are parties to the action. The action here was not of this character; nor were all the proper parties before the court. It was clearly an action at law, and in that point of view, as we have seen, the plaintiff could only recover for one-fourth of the debt for which all the sureties were liable. The distinction between the two classes of actions[3] is recognized by the decisions.

The remedies, the parties and course of procedure are each different. In the one, a jury trial is a matter of right; while in the other the trial is by the court. The costs are also in the discretion of the court. (Code, §§ 253, 306; 13 N. Y. [*supra*], 498). As the judgment could not require each of the parties to pay his aliquot share and furnish a remedy over against those who were insolvent and the rights of the parties be finally determined and fixed, it was under the facts proven clearly erroneous. Although in many cases under the Code the pleadings, if necessary, may be made to conform to the facts, and the case disposed of upon the merits, the defects here are so radical as to strike at the very foundation of the action, and cannot thus be remedied. Besides, the proper parties are not before us, and cannot be brought in, except on motion in the court below. As the claim was alleged in the complaint, there was no such defect of parties apparent as required the defendant to take the objection by demurrer or answer. * * *

Judgment reversed.

[3] The same distinction is made in actions by a creditor of a corporation against a stockholder on the latters liability for unpaid stock. The legal action must be brought against each stockholder separately, while in equity all should be joined. Perry v. Turner, 55 Mo. 418, (1874); Leucke v. Tredway, 55 Mo. App. 507, (1891).

BORDEN v. GILBERT.

Supreme Court of Wisconsin, 1861. 13 Wis. 670.

By the Court, COLE, J. This action was commenced in November, 1859, to foreclose a mortgage. The mortgage was given by Gilbert and wife to their co-defendant, Jeremiah R. Davis, to secure the payment of two promissory notes. The complaint states that the notes and mortgages were assigned by Jeremiah R. Davis to the respondent; and that the other defendant, Jeremiah Davis, for a valuable consideration expressed on the face of an instrument in writing signed by him, guaranteed the collection of the notes. There was no appearance by any of the defendants, and judgment by default was rendered for the sale of the mortgaged premises, and also for a personal judgment against the mortgagor, Gilbert, the assignor, Jeremiah R., and the guarantor, Jeremiah Davis, for any deficiency which might be found due after the security was exhausted. And the question arising upon the record is: Could the guarantor properly be made a party to the suit for the foreclosure of the mortgage, and was it regular to render a personal judgment against him in that action, for any deficiency which might be found due? Or, should the respondent first have exhausted his remedy upon the notes and mortgage before he could resort to his action upon the guaranty? In the case of Dunkley v. Van Buren, 3 Johns. Ch. R. 330, Chancellor Kent stated that a party, on a bill to foreclose a mortgage, was confined in his remedy to the pledge, and that such a suit was not intended to act *in personam*, and he therefore denied an application to incorporate in the decree a provision that the mortgagor pay any deficiency found due by a given day, or that execution issue against his other property. And it is very obvious that if a bill to foreclose a mortgage had been understood at once to give a remedy *in rem* and *in personam*, the books would not abound with cases where the question has arisen whether a mortgagee could proceed at law upon his bond, at the same time that he was prosecuting his suit in equity, or as to what would be the legal consequences of bringing his action at law after foreclosure, since there would have been no occasion for any such discussion, nor any necessity for any action on the bond. Judgment might have been given against the mortgagor in the chancery suit at the same time that a decree

was rendered for the sale of the mortgaged property. It was undoubtedly to obviate this difficulty, and to prevent a multiplicity of suits, that the legislature of New York provided that in a suit to foreclose a mortgage, the court should have the power to decree and direct the payment by the mortgagor of any balance of the mortgage debt. 2 N. Y. R. S. 191; 8 Paige 480. It was also provided that if the debt was secured by the obligation of any other person besides the mortgagor, such person might be made a party to the suit, and that the court might decree payment of the balance of such debt remaining unsatisfied, after the sale of the mortgaged premises, as well against such other person as against the mortgagor. Section 154. Under this section it has been held, that a mortgagee who assigns the mortgage and guarantees the principal and interest, is a proper party to the foreclosure suit. Bristol v. Morgan, 3 Edw. Ch. R. 142; Leonard v. Morris *et al.*, 9 Paige 90. And where the holder of the mortgage assigned it and covenanted with the assignee that it was due and collectible, and afterwards took a bond of a third person as security for the mortgage debt, it was held that the assignee was in equity entitled to this security, and that in a suit by him to foreclose, the obligor was properly joined as a defendant, in order that a decree might be made against him for any deficiency after the sale of the property. Curtis *et al.* v. Tyler *et al.*, 9 Paige 432. So when the purchaser of a portion of land mortgaged, assumed the whole mortgage, it was decided that the mortgagor was entitled to the benefit of such agreement, and that it was within the equity of the statute to give a decree over for the deficiency, against the third party liable for the payment of the mortgage debt. Halsey v. Reed, 9 Paige 446. See also Mann v. Cooper, 1 Barb. (Ch.) 186; Stone v. Steinbergh, id. 250; Bigelow v. Bush, 6 Paige 343; Vanderkemp v. Shelton, 1 Clark's Ch. R. 321; Luce v. Hines, id. 453.

Whether in some of the decisions in the above cases the statute was not extended so as to embrace cases not fairly coming within its provisions, we will not stop to inquire. It is sufficient to say that these provisions of the N. Y. statutes, which were substantially incorporated in ch. 84, R. S. 1849, have been left out of the present revision. We are therefore to determine, whether, in the absence of these provisions, it is regular and proper to make a third person who has guaranteed the collection

of the mortgage, a party to the suit to foreclose the mortgage. We are of the opinion that it is not. The plain, obvious import of the guarantor's contract is, that he will pay the debt, provided, on due diligence, it cannot be collected out of the mortgagor, or made out of the security. It is not an absolute promise to pay in the first instance. The respondent should exhaust his remedy against the mortgagor and the mortgaged property, before he can call upon the guarantor to make good his contract. The former are the primary sources to which he must look for the payment of his debt. If they fail or prove inadequate, then the guarantor becomes liable. It was therefore improper and erroneous to make the guarantor a party to this suit, and to take a personal judgment against him, under the allegations of the complaint. The respondent should first have exhausted his remedy upon the notes and mortgage, before proceeding against the guarantor, Jeremiah Davis.

The judgment of the circuit court must be reversed, and a new trial ordered.

WINSLOW v. DOUSMAN.

Supreme Court of Wisconsin, 1864. 18 Wis. 457.

The complaint in this action avers that in October, 1863, the plaintiff recovered in said circuit court a judgment against George D. Dousman for $4,576.85 damages, in an action on express contract; that the judgment was duly docketed with the clerk of said court in November following, and execution duly issued thereon, on which the sheriff made return of *nulla bona;* that the judgment remained wholly unsatisfied at the commencement of this action; that said defendant George D. Dousman had a considerable amount of notes, due bills, bonds and mortgages, contracts, accounts, money, legal and equitable debts, claims and demands due him from different persons (whose names were to the plaintiff unknown), and that he had goods, chattels, lands, tenements, leasehold interests in real estate, etc., either in his possession or held in trust for him, which plaintiff was unable to reach by execution, and which ought to be appropriated to the payment of his judgment; which property plain-

tiff feared said defendant would make away with or place beyond the reach of the court, unless restrained by injunction. The complaint further avers that at the time of contracting the debt on which said judgment was founded, and on the 1st of May, 1861, said George D. Dousman was the owner of certain described real estate in Milwaukee county; that on the day last mentioned, he conveyed certain specified portion of said real estate to his son Henry M. Dousman without any consideration; that on the 10th of the same month, said George D. and his wife, Martha A. Dousman, conveyed by warranty deed to said Henry M. Dousman, certain other specified parts of said real estate, certain of which were occupied by George D. Dousman and his wife as a homestead; that on the same day Henry M. Dousman conveyed the same property by warranty deed back to said Martha A. Dousman; that said conveyances from George D. to Henry M. and from Henry M. to Martha A., were all without consideration, and were made in fraud of the rights of plaintiff as creditor; and that the real property so conveyed constituted at the time of such conveyance, all the property of value belonging to said George D. out of which plaintiff could make the amount of his judgment aforesaid; that said Henry M. and Martha A. well knew the fraudulent intent of George D. in making said conveyances, and that the property so conveyed ought to be appropriated toward the payment of plaintiff's said judgment. Judgment is therefore demanded, that a receiver of all the property and effects of George D. Dousman be appointed by the court; that said George D. might be directed to assign and transfer to such receiver, upon oath, under the direction of a master of the court, all his property, equitable interests, things in action, money and effects, and all the books and papers relating thereto, and the evidences thereof; that out of said money, etc., plaintiffs might have satisfaction of said judgment; that said George D., his attorneys, etc., might be enjoined from collecting, selling, etc., or in any manner using, encumbering or disposing of, any demands due him, or any real or personal estate, whether in his own possession and held in his own name, or held by some other person for his use; that the defendants Henry M. and Martha A. Dousman be restrained, until the further order of the court, from in any manner disposing of the lands conveyed to them as hereinbefore stated; that said receiver be ordered to take possession of and to sell

all the property of George D. Dousman (except so much of the real estate conveyed as above described as was occupied by him for a homestead), or so much thereof as might be necessary, and apply the proceeds to the payment of plaintiff's said judgment, with the costs and charges of this suit, or that the conveyances above described be adjudged fraudulent and void, and the property be subjected to sale on execution to satisfy said judgment.

The defendant Martha A. Dousman demurred to the complaint on the grounds that Henry M. Dousman was improperly joined as defendant therein; that several causes of action were improperly united, which did not all of them affect all the parties, and which were not separately stated; and that the facts stated did not constitute a cause of action against her. The demurrer was overruled, and said defendant appealed.

By the Court, COLE, J. We have no doubt that the legislature by the passage of chapter 303, Laws of 1860, intended to restore the remedy by creditor's bill substantially as it had existed under chapter 84, R. S. 1849. * * *

The question then arises, is the complaint in this case good under the old practice? The principal objection taken to the complaint by the appellant is, that it professes to set out three causes of action of distinct natures, against three defendants not connected in interest. It is argued that the complaint states one cause of action against George D. Dousman, in the nature of a general creditor's suit under chapter 303, Laws of 1860; another against George D. and Henry M. Dousman, to have the conveyance of lot 1, block 19, declared void as to creditors, and subject the property to the payment of the judgment mentioned in the complaint; and a third against George D. and Martha A. Dousman, to have another conveyance of other real estate likewise declared void as to creditors, and subject that to the payment of the same judgment. The object of the suit then is, to reach property which the judgment debtor George D. Dousman has fraudulently conveyed to his son Henry M., and a portion of which the latter conveyed to his mother Martha A., wife of George D., for the purpose of placing it beyond the reach of creditors. The claim against all is of the same nature, that all the defendants have combined and acted in concert in these fraudulent transactions, and "all have a common interest centering in the point in issue in the cause." So that, while

the title to one piece of property is in one defendant, and the title to some other distinct piece in another defendant, yet these various titles were taken and are now held for a common purpose, and to accomplish the same fraudulent end. All are privy to and have been concerned in acts tending to the same illegal result. The matters are not distinct, but are, in truth, all connected with the same fraudulent transaction, in which all the defendants have participated. Where this is the relation of the defendants, it has been held that they may be joined in the same suit. In the case of Fellows v. Fellows, 4 Cowen 682, this whole subject in regard to multifariousness in a creditor's bill is most ably discussed, and the authorities reviewed. The rule deduced from the cases was, that "where several persons, although unconnected with each other, are made defendants, a demurrer will not lie if they have a common interest centering in the point in issue in the cause." P. 700. The allegations in this case bring the case fully within the reach of that principle. Here the defendants were connected in the same purpose, and have a common interest in the point in issue. We do not think there is any improper joinder of defendants, or of causes of action, in the complaint.[4]

The order of the circuit court, overruling the demurrer, is affirmed.

OLIPHINT v. MANSFIELD.

Supreme Court of Arkansas, 1880. 36 Ark. 191.

HARRISON, J.[5] This was a suit in equity, T. J. Oliphint against S. Mansfield & Co., B. Horton & Co., Fones & Bro.,

[4] For a case where there were independent fraudulent conveyances to different persons, see Mullin v. Hewitt, 103 Mo. 639, (1891). But see Hamlin v. Wright, 23 Wis. 491, where the distinction between the two classes of cases was apparently overlooked.

Compare Warnock Uniform Co. v. Garifalas, 224 N. Y. 522, (1918), where plaintiff was not permitted to maintain a suit in equity against a defendant who had obtained from him a number of promissory notes, and some eight transferees of the notes.

[5] Parts of the opinion omitted.

Russell & Newberry, and John A. Stallings. The complaint, in substances, alleged that Reynolds, Jones & Co., merchants at Conway, in Faulkner County, being insolvent, on the twenty-eights day of November, 1877, made an assignment, by deed, to the plaintiff of their stock of goods, and all their other property in trust, for the benefit of their creditors generally, to be sold and the proceeds equally and pro rata distributed among them. That the plaintiff accepted the trust, and on the same day, in accordance with the statute, filed, in the probate clerk's office, an inventory and description of the property, and executed a bond to the state in the penal sum of $5,000.

That on the eighth of December, 1877, S. Mansfield & Co. recovered judgment against said Reynolds, Jones & Co., before a justice of the peace of Cadron township, in said county, for $112.27; B. Horton & Co. for $158.26; Fones & Bro., for $79.43; and Russell & Newberry, for $130.43; and on the tenth of December, 1877, they sued out executions on their respective judgments, which were, on the same day, placed in the hands of the defendant, Stallings, the constable of said township, who had levied on the property so assigned and conveyed to the plaintiff, and was about to sell the same.

A perpetual injunction against the sale and the further intermeddling by the defendants with the property, was prayed for. A temporary injunction was granted at the commencement of the action.

The defendants demurred to the complaint for a misjoinder of defendants, and because it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, but gave the plaintiff leave to amend his complaint, which failing to do, the temporary injunction was dissolved; the defendants' damages assessed by the court at one hundred dollars for their counsel fee, for which a decree was rendered in their favor against the plaintiff, and the complaint dismissed at his cost.

The plaintiff appealed.

A misjoinder of defendants is no ground of demurrer; that objection can only be taken by motion to strike out the names of such as are improperly joined or sued.

But there was no misjoinder in this case, and the action was properly against all the defendants.

Any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a

necessary party to a complete determination and settlement of the question involved. Gantt's Digest, sec. 4476.

Here were several creditors seeking to subject the goods claimed by the plaintiff, to the satisfaction of their judgments, and the question involved in the controversy, was the validity of the assignment to him, in which they had a common interest.[6] * * *

Judgment affirmed.[7]

KEYES v. LITTLE YORK GOLD WASHING CO.

Supreme Court of California, 1879. 53 Cal. 724.

By the court:

The complaint sets forth that the plaintiff is the owner of certain described premises known as bottom land, situated in the valley, upon the banks of Bear River, about ten miles from where that stream debouches into the Sacramento Valley, and midway between that point and the mouth of the river; that the defendants are miners severally engaged in hydraulic mining at points high up on Bear River and its tributaries—the several mining properties of the defendants lying within a radius of seven miles upon the hilltops adjacent to the river, and being severally wrought and carried on by the respective defendants, and that the several dumps used by the defendants respectively in their mining pursuits are some of them in the bed of the river, others in the beds of steep ravines and gulches immediately contiguous to and leading into the bed of the river and its tributaries; that the tailings of the several mining claims deposited on these dumps are swept down the river by the force of the current until they reach the lands of the plaintiffs below, upon which they are deposited, and which they cover so as to destroy the value of the said lands. The prayer is that an

6 As to whether the judgment creditor is a necessary party defendant to a suit to enjoin the sheriff from levying execution, see Yount v. Hoover, 95 Kan. 752, L. R. A. 1915 F. 1120, annotated case.

7 In the omitted part of the opinion it was held that the bill was insufficient in failing to allege that there were other creditors who had assented to the assignment.

injunction issue enjoining the defendants from depositing the tailings and debris of their several mining claims so that they reach the channel of the river, etc.

The defendants appeared to the action, and filed a demurrer to the complaint upon several grounds—and, among others, upon the ground that there is a misjoinder of parties defendants, in that it did not appear by the complaint that the defendants jointly committed any of the acts complained of, or are acting therein in concert or by collusion with each other, but that, on the contrary, it did appear by the complaint that the defendants had no interest in common in the subject matter of the suit, but were acting severally and without any joinder or co-operation on the part of the defendants, or any of them. The demurrer was overruled by the court below, and the propriety of its action in that respect is brought in question by this appeal.

There are, indeed, recitals in the complaint alleging plaintiff to have already sustained damages, but no relief is sought upon them as allegations constituting the basis for a decree. They are rather in the nature of statements of evidence tending to sustain the averments that like damages will occur in the future, unless defendants are restrained. In the case of a demurrer for a misjoinder (even had damages for past injuries been demanded in this case) no judgment for damages could have been rendered against the defendants *jointly,* because they are charged each to have committed a tort severally; and several judgments for damages could not have been rendered against each defendant, in the same action, for such judgments would have demonstrated a misjoinder.

No damages are claimed in the prayer for judgment or in the "points" of counsel. The wrong complained of is that each of the defendants, acting for himself, and not in collusion with or combination with any other, threatens to continue to deposit the tailings from the workings of the mine in such position, on or adjacent to his own premises, as that, from natural causes, they will flow down or be forced down upon the plaintiff's premises.

If a nuisance was created by the exposure of the dumps to the action of the waters of Bear River and its tributaries, a nuisance was committed by each of defendants, when he—disconnected from the others—made or threatened such deposit; or, if it be said that the matter of the reasonable use of the stream can enter into the inquiry, there could be no nuisance by

any of the defendants who had made only a reasonable use.

In either view of the case, there is a misjoinder of parties defendant. The bare statement would seem to prove the proposition, since the very essence of the objection of a misjoinder of a defendant with others is that he is not connected with or affected by the single cause of action, if there is but one, or that he is not connected with or affected by one or more of several separate and distinct causes of action, if several are alleged. If any one of these defendants was liable to be enjoined, he could have been enjoined in a separate suit, the subject matter of such suit being the alleged threatened wrong. If anyone of the defendants is not liable to be enjoined in a separate suit, he cannot be made liable in an action like the present; for there is no principle of equity which would make a man responsible for a wrong which he has neither done nor threatened, merely by joining him with other defendants who may independently have threatened a similar wrong.

Several cases were cited by the counsel for respondent which it was claimed would sustain the joinder of the defendants in this action, but an examination will clearly distinguish them from the present. Mayor of York v. Pilkington, 1 Atk. 282, was a bill of peace to prevent a multiplicity of suits. In a certain sense, all bills of peace are intended to prevent multiplicity of suits, but it is a *non sequitur* to assert that wherever the result of assumed jurisdiction by a court of equity will relieve the plaintiff of the inconvenience of bringing several separate actions at law or suits in equity, the complaint is to be termed a bill of peace. In Mayor v. Pilkington, a bill was *brought to quiet the plaintiffs in a right of fishery* in the River Ouse, of which *they claimed the sole fishery* "of a large tract" against the defendants, who, it was suggested by the bill, *claimed several rights,* either as lords of manors or occupiers of adjacent lands. The main question was whether, in view of the fact that there was no privity between the defendants, the bill could be maintained. Holding the affirmative on this proposition, the court of chancery was authorized to retain the cause for other purposes. But the gravamen of the bill was not that the defendants were several and separate trespassers (the view upon which the demurrer was sustained at the first argument,) but was that the plaintiff had an exclusive right against which defendants were asserting adverse rights. The proceeding was analogous to our

action to quiet title. The present case more resembles Dilley v. Doig, 2 Vesey, Jr. 486, in which the proprietor of a copyright sought to restrain in the same suit several and independent infringements of his right by different persons. In that case there was no allegation in the bill of a claim of right on the part of the defendants to sell copies of the spurious edition of the book, and, from the nature of the circumstances detailed, there could have been no such allegations. The defendants were alleged to be severally wrongdoers without any combination. The Lord Chancellor said: "The right against the different booksellers is not joint, but perfectly distinct; there is no *privity*." The subject matter of the bill was a wrong done by each of the booksellers; its object was not to obtain a final determination that the plaintiff had the exclusive right, and that the defendants had no right (for it was not asserted that they claimed any) but, as in the present case, simply to enjoin wrongs threatened by the defendants severally, and not *jointly*." In Whaley v. Dawson, 2 Shoales & L. 367, a demurrer was *sustained*, "for that it appeared by said bill that the same was exhibited against the defendants and one Michael Carraher for several and distinct causes and matters, that have no relation or dependencies on each other." In Brinkerhoff v. Brown, 6 Johns. Ch. 137, Chancellor Kent remarks: "There was a series of acts on the part of the persons concerned in the 'Genesee Company,' all produced *by the same fraudulent intent*, and terminating in the deception and injury of the plaintiff. The defendants performed different parts in the same drama; but it was still one piece—one entire performance, marked by different scenes." * * * It is claimed that New York & New Haven Railroad Company v. Schuyler, 17 N. Y. 603 (34 N. Y. 45), is strongly in point. But that was a case where the plaintiffs claimed a right to have certain stock canceled as having been fraudulently issued, and the defendants, as the complaint alleged, "all claimed rights; * * * all asserted a claim upon the company in some form." (17 N. Y. 594-595.) The case was determined upon its analogies to a bill to *quiet title* and to *remove a cloud*. The learned judge likened it to a case of an individual clothed with the legal title to the railroad property, receiving its gross earnings for the purpose of dividing the net profits among a large number of individuals whose rights were evidenced by certificates of stock. In such a case, if a new class should come

forward claiming the same rights, and presenting instruments of the same kind as the certificates, bearing on their face all the evidences of genuineness, but in fact unauthorized and spurious, it would be the right and duty of the *legal owner* (upon settled principles of equity) to call the false claimants into Court, in order to remove the cloud upon the equitable interests of those whom he represented. (Ibid. 598.)

It is unnecessary to dwell upon the analogies between the cases of N. Y. & N. H. R. R. Co. v. Schuyler, and the Mayor of York v. Pilkington, or on the very marked differences between the former and the case at bar. In the court of appeals, 34 N. Y., the complaint was expressly characterized as "a bill of peace, to quiet titles, settle rights, and prevent a multiplicity of suits." An examination of Thorpe v. Brumfit, Law R. Ch. App. Cases, vol. 8, shows that the parties all had a contract relation with each other, by reference to which their respective rights were to be determined; and further, that no question of joinder was raised, but, on the contrary, the defendant's *all answered together,* insisting that they all had a certain right of way, to be exercised in a reasonable and proper manner (p. 653). In People v. Morrill, 26 Cal., the objection was that there was a misjoinder of plaintiffs. It was held (and apparently admitted) that all the plaintiffs were properly joined, so far as relief by cancellation of the patent was concerned, and it was said that the demurrer should be overruled because too general.

We think the distinction between the case at bar and the other American cases cited by the respondent—Gaines v. Chew, 2 How. 619, amongst them—is equally susceptible of explanation. With respect to the Scotch cases, it is enough to say that, under the system of law which obtains in Scotland, it would appear that parties and causes of action may be united in a manner not permissible in countries where the common law prevails; the inconveniences and evils resulting from the joinder of parties without community of interest being there avoided by a system which allows the "conjunction" of causes and the submission of special issues to the triers of fact.

At *law,* where an action for tort is brought against several co-defendants, it is essential that the wrong complained of be joint. (Dicey on Parties 449.) This rule is thoroughly understood,

and is not disputed. If there are any exceptions in equity[8] they have not been called to our attention. We are convinced that none can be found which will authorize the joinder of defendants attempted in the proceeding before us. We have no doubt that the objections to the complaint above considered could properly be presented by a demurrer on the ground of misjoinder of parties defendant.

Judgment and order reversed and cause remanded, with directions to the court below to sustain the demurrer to the complaint. Remittitur forthwith.

HILLMAN v. NEWINGTON.

Supreme Court of California, 1880. 57 Cal. 56.

SHARPSTEIN, J. The respondent Hillman brought an action against eight defendants, the appellants herein, and alleged that he was entitled, by virtue of a prior appropriation, to 1,600 inches of the water flowing in a stream known as Willow Creek, and that the appellants diverted the waters of said creek from the natural channel thereof, so as to prevent them from flowing into the plaintiff's ditches, and thereby deprived him of the water to which he was entitled. He further alleged, that the defendants threatened, and intended unless restrained by an order of the court, to continue said diversion and deprivation, and prayed that they be enjoined from so doing. There are other allegations of damages, and a demand of judgment therefor. Most of the material allegations of the complaint are specifically denied by the defendants. They first "deny that they have any joint interest in the subject matter of this action, or that they have jointly done any act or thing mentioned in the complaint; or that they are jointly liable to the plaintiff in any matter or thing connected with or growing out of the subject matter of the action, either of the matters or things

[8] See Miller v. Highland Ditch Co., 87 Cal. 430, (1891), allowing an injunction in a somewhat similar case, but refusing to award damages. A number of the cases dealing with the liability of the defendants for damages are collected in Day v. Louisville Coal Co., 10 L. R. A. (N. S.) 167, (1906), annotated.

mentioned or set out in the complaint, or of the matters hereafter mentioned and set out in this answer."

"And the defendants aver, that their rights and interests in all matters connected with the subject matter of this action are separate and independent of each other, and that for these reasons they are improperly joined as defendants in this action."

Afterwards they allege, that each of the defendants is the owner and in the actual possession of a separate and distinct tract of land; and that each of them has, without any connection with any other, diverted a distinct and separate part of the water of said creek for his individual use. In other words, that they have acted severally and not jointly, in the premises.

The court found, that the right of the plaintiff to 400 inches of the waters of said creek, measured under a four inch pressure, were prior and paramount to the rights of the defendants, or any of them, in said waters; and that the defendants had severally, and not in concert, diverted said waters to such an extent that said 400 inches "did not pass down to the heads of plaintiff's ditches." The judgment of the court is, that the defendants be perpetually enjoined from "diverting said waters, or any part of them, from their natural channel, during the months of April, May and June of each year, to such an extent as that 400 inches of water, measured under a four-inch pressure, shall not pass down the channel of Willow Creek below the head of the defendant Newington's ditch and to the head of the plaintiff's upper ditch;" and that the plaintiff recover of the defendants $1 damages, and the costs of suit, taxed at $787.91; and that as between the defendants, the costs and damages should be apportioned. From that judgment, the defendants appeal.

The point most strongly pressed upon our attention by appellant's counsel is, that there is a misjoinder of parties defendant, because they did not act jointly or in concert in diverting the plaintiff's water. It does appear, however, that the plaintiff is entitled to a certain quantity of water, of which he is deprived by the defendants. None of them have a right to use any of the water of Willow Creek, unless there is more than four hundred inches flowing in it. If there be more than the amount flowing in it at any time, the plaintiff has no interest in the surplus. What the respective rights of the defendants may be in it in no way concerns him.

It is not at all improbable that no one of the defendants de-

prives the plaintiff of the amount to which he is entitled. If not, upon what ground could he maintain an action against any one of them? If he were entitled to all the water of the creek, then every person who diverted any of it would be liable to him in an action. But he is only entitled to a certain specific amount of it, and if it is only by the joint action of the defendants that he is deprived of that amount, it seems to us, that the wrong is committed by them jointly, because no one of them alone is guilty of any wrong. Each of them diverts some of the water. And the aggregate reduces the volume below the amount to which the plaintiff is entitled, although the amount diverted by anyone would not. It is quite evident, therefore, that without unity or concert of action, no wrong could be committed; and we think that in such a case, all who act must be held to act jointly.

If there be a surplus, the defendants can settle the priority of right to it among themselves. That can in no way affect the plaintiff's right to the amount to which he is entitled. It does not seem to us that the defendant's answer, that each one of them is acting independently of every other one, shows that the wrong complained of is not the result of their joint action; and if it does not, the answer in that respect is insufficient to constitute a defense. The case, so far as we are advised, is *sui generis*. No parallel case is cited by either side. The objection that the judgment does not apportion the payment of the damages and costs equally between the defendants, can be obviated by a modification of the judgment in that respect. And it is ordered that it be so modified; and with that modification it is affirmed.

Judgment affirmed.

STATE EX REL. v. DEARING.

Supreme Court of Missouri, 1912. 244 Mo. 25.

GRAVES, J. Relator seeks to have respondent, as judge of the circuit court of Jefferson county, prohibited from further proceeding in a case wherein one Steinmetz is plaintiff and this relator and some four other mining companies are defendants.

Steinmetz, who is the owner of land or lands bordering upon Big river, sues to enjoin relator and the other defendants from polluting the waters of such running stream, which is alleged they do by discharging into said stream certain named substances from their mines and mills, all to the irreparable damage of said plaintiff and his lands, as well as to divers other persons and their lands. The details of this petition are immaterial, but such is the general purport. The relator is a nonresident corporation, but licensed to do business in this state. In due time the relator herein petitioned the said circuit court for a removal of said cause to the District Court of the United States for the Eastern Division of the Eastern District of Missouri, on the ground that plaintiff's petition stated a separable controversy wholly between said plaintiff in that suit and this relator as defendant in that suit, which could be separately and wholly determined as between the two parties aforesaid, one of which parties the plaintiff was a citizen of Missouri, and the other, this relator, a citizen of Delaware.

I. Respondent refused to grant and make an order of removal in compliance with the prayer of relator's petition therefor. * * *

The return admits many of the charges in relator's petition and specifically answers as to others. The further facts can be stated best with the discussion of the points made, which are as above indicated. * * *

Nor do we think there is substance in the contention that the petition shows upon its face that the action in the circuit court is necessarily a separable controversy between citizens of different states. It must not be overlooked that this is not an action for damages, but an injunctive action to abate a nuisance and to restore the stream to its natural condition. It does appear from the petition that whatever was done by the several defendants toward polluting the stream was done independently. In other words, each defendant has its own separate milling plant, and the refuse from them is placed into the stream by the several defendants in the ordinary and usual manner of doing their respective work. One defendant had nothing to do with the work and doings of the other. But, on the other hand, the petition charges that the combined wrongful doings of all defendants has produced the present condition of the river, and has therefore produced the nuisance sought to be abated.

To our mind counsel for respondent well states the law as to what is a separable controversy under the laws of the United States, when they say: "The rule as to joint liability, in an action for damages caused by the pollution of a stream by separate acts of different parties, is entirely different from an action, as in this case, by injunction to restrain all parties who by their separate acts pollute a stream and create a nuisance. There is a distinction between suits for injunction and actions for damages in regard to the joinder of parties contributing toward an injury."

There is a marked distinction between actions in equity and actions at law in cases of this character. If the plaintiff Steinmetz had sued these five defendants for damages resulting to his property by reason of their alleged separate acts, the cause of action stated would be a separable cause of action, because each defendant would only be liable for such proportionate part of the whole damage as it had done by reason of its individual wrongful act. Better stated, each defendant would only be liable to plaintiff for such damage as its individual wrongful acts had occasioned.

But in equity where the purpose of the action is to abate the nuisance which produces the injury, and thereby restore the stream, the rule as to joinder of parties is different. In such cases each party contributing in any way to produce the pollution of the stream is a proper party defendant, and no separable cause of action stated.

In a note to the case of Warren v. Parkhurst, 6 L. R. A. (N. S.) 1149, the learned annotator has clearly drawn the distinction in this language: "The opinion in the above case brings out very clearly the distinction between suits for injunction and those for damages, with respect as to the joinder of parties contributing toward an injury, and the cases directly in point are fully set out in the opinion. The case in which a joint recovery of damages for the pollution was denied, however, deserve a little notice by way of emphasis. In Martinowsky v. Hannibal, 35 Mo. App. 70, it was held that persons who deposit filth in a stream at different points cannot be made joint defendants in a suit for damages, but each must be sued separately, and recovery can be had against him for only his proportion of the total injury. So, persons who, independently and without cooperation or concert of action, turn surface water into a drain

to the injury of a lower proprietor, cannot be made jointly liable as joint tort-feasors. Bonte v. Postel, 109 Ky. 64, 58 S. W. 536, 51 L. R. A. 187. So. owners of property, who petition a city for the construction of a sewer and agree to use it, are not jointly liable with the city for damages caused by unskillful and negligent construction of the sewer, so that it pollutes a water course to the injury of a lower riparian owner. Carmichael v. Texarkana, 54 C. C. A. 179, 116 Fed. 845, 58 L. R. A. 911, affirming (C. C.) 94 Fed. 561. And a similar result was reached, although upon different grounds, in Thompson v. Reasoner, 122 Ind. 454, 24 N. E. 223, 7 L. R. A. 495. The ground of the distinction between the two classes of actions is that in the injunction suit the object is to do away with the nuisance and restore the stream to its ancient purity. To accomplish this, all that is necessary is to require the person contributing to the injury to refrain therefrom. This can be done in one action, and it is unnecessary to maintain separate actions against each contributing party. On the other hand, as shown in 2 Farnham, Waters, 1716, a person polluting a water course is liable in damage only for his own act, and not for that of any others who may contribute to the injury. If others have contributed, his deposit must be separated by means of the best proof the nature of the case affords, and his liability ascertained accordingly. Seely v. Alden, 61 Pa. 302, 100 Am. Dec. 642; Chipman v. Palmer, 77 N. Y. 51, 33 Am. Rep. 566, affirming 9 Hun 517. This separation can be accomplished without a confusion of issues only by an action in which the individual is the sole defendant. Therefore such action must be brought against individuals, and not against the several defendants jointly." * * *

It may be that the plaintiff Steinmetz could have brought separate actions in equity against each of these defendants, but this would not change the rule. Such would not have been the better practice.

In Moon on the Removal of Causes, § 142, p. 402, it is said: "There are many causes of action which are, in their nature, joint and several. A plaintiff may sue all the parties liable, or sue any one or more of them, at his election. Where the plaintiff has a right under the law to sue defendants jointly, the defendants cannot obtain an advantage from the fact that he also had a right to sue them separately. If a plaintiff sues two or more persons jointly in such a case, the fact that the plaintiff

might have brought several actions against each defendant, instead of one action against them all, does not make the suit embrace *separable controversies*. This rule applies to actions upon joint and several contracts. It applies as well to actions in tort, which are, in their nature, joint and several." The italics are ours. So that if it be granted that Steinmetz could have instituted separate equity suits, yet if he had the right to join the defendants, as we think he did, such defendants gain no advantage as to the question of removal, simply because of the fact that plaintiff could have sued them in equity either singly or jointly.

The cases cited and relied upon by counsel for relator are largely actions at law for damages,[9] and it is well settled in this state, as elsewhere, that in such case the defendants should not be joined, and if the petition shows upon its face that the damages were done by the defendants acting independently and separately, and if one of them is a citizen of another state, then there is a separable cause of action, which is removable to the proper federal court. But those cases are not in point in this case.

Respondent was not in error when he refused to remove the cause. The jurisdiction of the cause is properly in respondent's court. Our preliminary rule in prohibition will therefore be quashed, and the writ of prohibition refused. All concur.

9 That in such cases there is no joint liability for damages, see Benson v. St. Louis, 219 S. W. 575 (Mo. 1920). William Tackaberry Co. v. Sioux City Service Co., 40 L. R. A. (N. S.) 102, (1911),

CHAPTER III.

THE COMPLAINT.

Code of Civil Procedure of New York.

§ 478. "The first pleading, on the part of the plaintiff, is the complaint."

§ 481.[1] The complaint must contain:

"1. The title of the action, specifying the name of the court

[1] This section appears in substance in all of the Codes, in much the same language. In a number of them, however, the subdivision dealing with the demand for judgment contains a provision to the effect that if money or damages be demanded the amount must be stated.

For the exact wording see:

Alaska Code, 1900, § 57; Arizona, R. S., 1913, § 425; Arkansas, Dig. Stat., 1921, § 1187; California, Code Civ. Proc., 1915, § 426; Connecticut, G. S., 1918, § 5630; Idaho, Comp. Stat., 1919, § 6687; Indiana, Burn's Ann., Stat., 1914, § 343; Iowa, Comp. Code, 1919, § 7191; Kansas, Gen. Stat., 1915, § 6983; Kentucky, Rev. Code, 1900, § 90; (differs from N. Y. on demand for judgment). Minnesota, G. S., 1913, § 7753; Missouri, R. S., 1919, § 1220; Montana, Rev. Code, 1907, § 6532; Nebraska, Ann. Stat., 1911, § 1095; Nevada, Rev. Laws, 1912, § 5038; New Mexico, Ann. Stat., 1915, § 4104; New York, Civ. Prac. Act, 1920, § 255: "The complaint must contain: 1. The title of the action, specifying the name of the court in which it is brought; if it is brought in the supreme court, the name of the county which the plaintiff designates as the place of trial; and the names of all the parties to the action, plaintiff and defendant. 2. A statement of each cause of action. 3. A demand of the judgment to which the plaintiff supposes himself entitled."

North Carolina, Consol. Stat., 1919, § 506; North Dakota, Comp. Laws, 1913, § 7440; Ohio, Gen. Code, 1921, § 11305; Oklahoma, Rev. Laws, 1910, § 4737; Oregon, Comp. Laws, 1920, § 67; South Carolina, Code, 1912, § 192; South Dakota, Rev. Code, 1919, § 2346; Utah, Comp. Laws, 1917, § 6566; Washington, Rem. & Bal. Code, 1910, § 258; Wisconsin, Stat., 1919, § 2645; Wyoming, Comp. Stat., 1920, § 5649; U. S. Equity Rules, 1912, No. 25: "Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:

in which it is brought; if it is brought in the supreme court, the name of the county, which the plaintiff designates as the place of trial; and the names of all the parties to the action, plaintiff and defendant.

"2. A plain and concise statement of the facts, constituting each cause of action, without unnecessary repetition.

"3. A demand of the judgment[2] to which the plaintiff supposes himself entitled."

§ 482. In an action triable by the court, without a jury, the plaintiff may, in a proper case, demand an interlocutory judgment, and also a final judgment, distinguishing them clearly.

§ 483. "Where the complaint sets forth two or more causes of action, the statement of the facts constituting each cause of action must be separate and numbered."

§ 484.[3] "The plaintiff may unite in the same complaint, two

First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.

Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.

Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.

Fifth, a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked."

2 Where there is no answer, the judgment shall not be more favorable to the plaintiff, than that demanded in the complaint. Where there is an answer, the court may permit the plaintiff to take any judgment, consistent with the case made by the complaint, and embraced within the issue. N. Y. Code Civ. Proc. § 1207.

3 There is a good deal of variation in the corresponding sections of the several codes; few, if any, adopt precisely the same subdivisions found in the New York Code, and a number omit entirely the class, "arising out of the same transaction or transactions connected with the same subject of action."

See Alaska, Code, 1900, § 84; Arizona, R. S., 1913, § 427; Arkansas, Dig. Stat., 1921, § 1076; California, Code Civ. Proc., 1915, § 427; Connecticut, G. S., 1918, § 5636; Idaho,

or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows:

1. Upon contract, express or implied.

2. For personal injuries, except libel, slander, criminal conversation or seduction.

3. For libel or slander.

4. For injuries to real property.

5. Real property, in ejectment, with or without damages for the withholding thereof.

6. For injuries to personal property.

7. Chattels, with or without damage for the taking and detention thereof.

8. Upon claims against a trustee, by virtue of a contract, or by operation of law.

9. Upon claims arising out of the same transaction, or transactions connected with the same subject of action, and not

Comp. Stat., 1919, § 6688; Indiana, Burn's Ann. Stat., 1914, § 279; Iowa, Comp. Code, 1919, § 7078; Kansas, Gen. Stat., 1915, § 6979; Kentucky, Rev. Code, 1900, § 83; Minnesota, G. S., 1913, § 7780; Missouri, R. S., 1919, § 1221; Montana, Rev. Code, 1907, § 6533; Nebraska, Ann. Stat., 1911, § 1090; Nevada, Rev. Laws, 1912, § 5039; New Mexico, Ann. Stat., 1915, § 4105; New York, Civ. Prac. Act, 1920, § 258: "The plaintiff may unite in the same complaint two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows:

1. Upon contract, express or implied.

2. For personal injuries, except libel, slander, criminal conversation or seduction.

3. For libel or slander.

4. For injuries to real property.

5. Real property in ejectment, with or without damages for the withholding thereof.

6. For injuries to personal property.

7. Chattels, with or without damages for the taking or detention thereof.

8. Upon claims against a trustee, by virtue of a contract, or by operation of law.

9. Upon claims arising out of the same transaction, or transactions connected with the same subject of action, whether or not included within one or more of the other subdivisions of this section.

10. For penalties incurred under the conservation law.

11. For penalties incurred under the agricultural law.

12. For penalties incurred under the public health law.

It must appear upon the face of the complaint that all the causes of action so united belong to one of the foregoing subdivisions of this section; that they are consistent with each other; and it must appear upon the face of the com-

included within one of the foregoing subdivisions of this section.

10. For penalties incurred under the fisheries, game and forest law.

But it must appear, upon the face of the complaint, that all the causes of action, so united, belong to one of the foregoing subdivisions of this section; that they are consistent with each other; and, except as otherwise prescribed by law, that they affect all the parties to the action; and it must appear upon the face of the complaint, that they do not require different places of trial."

SECTION 1. THE FACTS CONSTITUTING THE CAUSE OF ACTION.

1. *Law and Fact.*

SMITH v. DEAN.

Supreme Court of Missouri, 1853. 19 Mo. 63.

In the court below there was a judgment for defendant on

plaint, that they do not require different places of trial.

A provision of statute authorizing a particular action, or regulating the practice or procedure therein, shall not be construed to prevent the plaintiff from uniting in the same complaint two or more causes of action pursuant to this section."

North Carolina, Consol. Stat., 1919, § 507; North Dakota, Comp. Laws, 1913, § 7466; Ohio, Gen. Code, 1921, § 11306; Oklahoma, Rev. Laws, 1910, § 4738; Oregon, Comp. Laws, 1920, § 94; South Carolina, Code, 1912, § 218; South Dakota, Rev. Code, 1919, § 2371; Utah, Comp. Laws, 1917, § 6567; Washington, Rem. & Bal. Code, 1910, § 296; Wisconsin, Stat., 1919, § 2647; Wyoming, Comp. Stat., 1920, §§ 5606, 5607; U. S. Equity Rules, 1912, No. 26: "The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there is more than one plaintiff, the causes of actions joined must be joint, and if there be more than one defendant the liability must be one asserted against all the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials."

demurrer to the petition and the plaintiff sued out a writ of error.[4]

GAMBLE, Judge, delivered the opinion of the court:

The plaintiffs claim to recover on a bond made by the defendant, Dean, payable to one Crupper. They allege that they are the legal holders of the bond, as trustees of Crupper, for the benefit of his creditors. The bond was payable on the 2d of September, 1840. There is no allegation that the bond was assigned to the plaintiffs. The petition was demurred to and the demurrer was sustained. Two questions are presented on the demurrer. 1. Whether the title of the plaintiffs to the bond is sufficiently stated in the petition. 2. Whether the petition does not show that the action on the bond is barred by the statute of limitations.

1. We will not say how far the act requiring the assignment of bonds and notes to be by indorsement thereon, in order to enable the assignee to sue in his own name, is affected by the code of practice, which abolishes the distinction between law and equity, and requires all suits to be commenced and prosecuted in the name of the real party in interest. But if an assignee, or the person beneficially interested in a bond may sue thereon, without stating an indorsement, he must still state his title in his petition. To state that he is the legal holder, is to state a conclusion of law from facts[5] that are traversable. He must state facts that give him the title to the bond, when, upon its own face, the title appears to be in another. The obligation of the defendant was, to pay money to Crupper. By what facts did he become bound to pay it to the plaintiffs? The petition fails to state the facts. The petition says the plaintiffs are the

4 Statement supplied by the editor, and part of the opinion omitted.

5 Buller, J., in The King v. Lyme Regis, 1 Douglas 149 (1779): * * * "It is one of the first principles of pleading that you have only occasion to state the facts; which must be done, for the purpose of informing the court, whose duty it is to declare the law arising upon those facts, and to apprize the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it."

Compare Ld. Mansfield, in Cort v. Birkbeck, 1 Douglas 218, (1779): * * * "This (action on the case) is not like an ejectment, or an action for money had and received, where conclusions only are stated in the declaration, and the premises appear in the evidence." Trover and detinue might well have been included in the list.

legal holders, as trustees for Crupper, for the benefit of his creditors. This is no statement of any act done by Crupper transferring the bond. The plaintiffs may be constituted such trustees by the act of Crupper, or if the transaction occurred in another state, they may be trustees of an insolvent debtor, appointed by law. The petition is, in this respect, defective. * * *

The judgment is, with the concurrence of the other judges, affirmed.

PAYNE v. TREADWELL.

Supreme Court of California, 1860. 16 Cal. 220.

On petition for rehearing, FIELD, C. J., delivered the opinion of the Court.

The defendants apply for a rehearing upon three grounds, which were not noticed in the opinions delivered in this case: 1st. Error in overruling the demurrer to the complaint. * * *

The first ground was discussed in the briefs of counsel, and should have been considered in the opinion; for, if sustained, it must lead to a reversal of the judgment. We will now supply the omission and proceed to consider it at length.

The complaint alleges "that the said plaintiffs are the owners in fee as tenants in common, and have the lawful right and are entitled to the possession" of the described premises, and that the said defendants wrongfully entered upon and are now in the wrongful and unlawful possession of said premises, and wrongfully and unlawfully withhold the possession thereof from said plaintiffs. Then follows the prayer: "Wherefore, the plaintiffs demand judgment that they recover and be put in possession of said premises, and that the defendants pay damages for the unlawful withholding of said premises, and for the rents and profits thereof, in the sum of $3,000."

To the complaint the defendants demurred, on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer, if we understand it, is also directed to the absence of any allegations as to the damages claimed in the prayer.

The principal objection to the complaint, and the only one urged in the brief of counsel, and in the petition for a rehearing, is that its allegations of title and right of possession in the plaintiffs, and of the wrongful and unlawful possession by the defendants, are not allegations of facts but of conclusions of law.

It is usual to speak of the action to recover the possession of real property as an action of ejectment, and it is possible that with the technical designation it is sometimes thought that some of the technical allegations peculiar to the old form of the action are still necessary. But such is not the case. There is but one form of civil action in this State, and all the forms of pleadings and the rules by which their sufficiency is to be determined are prescribed by the Practice Act. (See sec. 37.) The complaint must contain "a statement of the facts constituting the cause of action in ordinary and concise language," and it may be verified by the oath of the party, in which case the answer must also be verified. The system in this State requires the facts to be alleged as they exist, and repudiates all fictions. And only such facts need be alleged as are required to be proved, except to negative a possible performance of the obligation which is the basis of the action, or to negative an inference from an act which is in itself indifferent. Now, what facts must be proved to recover in ejectment? These only: that the plaintiff is seized of the premises, or of some estate therein in fee, or for life, or for years, and that the defendant was in their possession at the commencement of the action. The seizin is the fact to be alleged. It is a pleadable and issuable fact, to be established by conveyances from a paramount source of title, or by evidence of prior possession. It is the ultimate fact upon which the claim to recover depends, and it is facts of this character which must be alleged, and not the prior or probative facts which go to establish them. It is the ultimate facts—which could not be struck out of a pleading without leaving it insufficient—and not the evidence of those facts, which must be stated. It is sufficient, therefore, in a complaint in ejectment for the plaintiff to aver in respect to his title, that he is seized of the premises, or of some estate therein in fee, or for life, or for years, according to the fact. The right to the possession follows as a conclusion of law from the seizin, and need not be alleged.

The possession of the defendant is of course a pleadable and issuable fact, and the only question of difficulty arises from the supposed necessity of negativing its possible rightful character. That negative allegations, which are not required to be proved, may in some actions be necessary, may be admitted; but is there any such necessity as to the possession of the defendant in an action of ejectment? It seems to us that the substance of a complaint in ejectment under our practice is this: "A owns certain real property, or some interest in it; the defendant has obtained possession of it, and withholds the possession from him." If the defendant's holding rests upon any existing right, he should be compelled to show it affirmatively, in defense. The right of possession accompanies the ownership, and from the allegation of the fact of ownership—which is the allegation of seizin in "ordinary language"—the right of present possession is presumed as a matter of law. We do not think, therefore, any allegation beyond that of possession by the defendant is necessary, except that he withholds the possession from the plaintiff. The allegation that the possession is "wrongful or unlawful" is not the statement of a fact, but of a conclusion of law. The words are mere surplusage, and though they do not vitiate, they do no good. The withholding of the posesssion from one who is seized of the premises, is presumptively adverse to his right, and wrongful. It is by force of this presumption that the plaintiff can rest, in the first instance, his case at the trial upon proof of his seizin, and of the possession by the defendant. From these facts, when established, the law implies a right to the present possession in the plaintiff, and a holding adverse to that right in the defendant.

Where the plaintiff has been in possession of the premises for which he sues, it will be sufficient for him to allege in his complaint such possession, and the entry, ouster and continued withholding by the defendant. Such allegations are proper when they correspond with the facts, but they are not essential, as is thought by many members of the bar. In this state, the possession does not always accompany the legal title. The statute authorizes a sale and conveyance of land held adversely by third persons; and the legal title is frequently held by parties who never had the possession.

In the Courts of New York—and it is well known that the

Practice Act was taken principally from the code of procedure of that State—there was at one time some conflict of opinion as to what were sufficient allegations in a complaint in ejectment under the code. It is now, however, settled by the Supreme Court of that State substantially in accordance with the views we have expressed. In Ensign v. Sherman (14 How. Prac. 439) the plaintiff averred in her complaint that she had lawful title as the owner in fee simple to the real estate in controversy, which was described; that the defendant was in possession of it, and unlawfully withheld possession thereof from her, and on demurrer the complaint was held sufficient. Walter v. Lockwood (23 Barb. 228) is to the same effect. * * *

It follows, from the views we have expressed, that the complaint in the case at bar is sufficient. It avers that the plaintiffs are the owners[6] in fee, as tenants in common, of the premises; that the defendants are in possession of the same, and withhold the possession thereof from the plaintiffs. Whatever is alleged beyond these averments is immaterial, and may be stricken out. The facts essential to a good complaint are stated, and the additional allegation of lawful right and title in the plaintiff, and the designation of "wrongful" and 'unlawful" applied to the possession and withholding of the defendant, though unnecessary, do not vitiate the pleading; and the demurrer was properly overruled.

SCOFIELD v. WHITELEGGE.

Court of Appeals of New York, 1872. 49 N. Y. 259.

Appeal from judgment of the General Term of the Superior Court in the city of New York, affirming a judgment in favor of the defendant entered upon the decision of the court at circuit dismissing plaintiff's complaint, and also affirming an order denying a motion for a new trial. The action was for the recovery of personal property. The complaint alleged

6 And so in case of a general allegation that the plaintiff was the owner and entitled to possession of specific personal property, Farmers Bk. v. Davis, 93 Ore. 655; (1919).

that the defendant had become possessed of and wrongfully detained from plaintiff a piano of the value of $400, and demanded a return thereof, etc. The answer denied the possession of any property belonging to the plaintiff, and denied the wrongful detention and plaintiff's ownership of the piano. Upon the trial, before the case was opened, defendant moved for a dismissal of the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, which motion was granted.

Folger, J.: The complaint in this action does not in terms show any right or title in the plaintiff upon which the former action of replevin would lie. That action could be maintained only by one who had the general or a special property in the thing taken or detained. That property must have been averred in the declaration, or it would not have sufficed the plaintiff's purpose. (Pattison v. Adams, 7 Hill 126; see also Bond v. Mitchell, 3 Barb. 304; Vandenburgh v. Van Valkenburgh, 8 id. 217.) The chapter of the Code of Procedure of "The Claim and Delivery of Personal Property," was intended to supply the provisional relief which was theretofore obtained in the action of replevin. (See Commissioner's Report, p. 169.) There was no intention to change the requisites to maintain the action. There was no change made. Indeed the code, as reported, expressly required an affidavit from the plaintiff, where a delivery was to be made, that he was the owner of the property, or lawfully entitled to the possession thereof by virtue of a special property therein. (Commissioner's Report, p. 170, § 182, sub. 1.) And so it now is. (Code, § 207.)

Nor is it less necessary now than then, for the plaintiff to aver the facts which constitute his cause of action. He must allege the facts, and not the evidence; he must allege facts, and not conclusions of law. The plaintiff here alleges that the defendant wrongfully detains from him the chattel in question. If, indeed, that be true, then it must be that the plaintiff has a general or special property in the chattel, and the right of immediate possession. But unless he has that general or special property and right of immediate possession, it cannot be true that it is wrongfully detained from him. The last, the wrongful detention, grows from the first, the property and the right

of possession. The last is the conclusion.[7] The first is the fact, upon which that conclusion is based. It is the fact which in pleading must be alleged.

Where facts are stated in a pleading which militate with a conclusion of law therein stated, the statement of facts will prevail. (Jones v. Phoenix Bank, 8 N. Y. 228; Robinson v. Steward, 10 id. 189.) And is not the statement of a conclusion of law, without a fact averred to sustain it an immaterial statement?

The plaintiff says that the defendant wrongfully detains from him the piano. The fact involved in that statement is that he detains it. Granted, then, that he detains it. Why is it wrongful? Because the plaintiff is the owner by general or special right of property, and entitled to the immediate possession. But these are the facts which are to be shown. They have not been averred. How, then, can they be shown?

The plaintiff claims, however, that the averment in the answer denying detention, and denying ownership in the plaintiff, puts in issue those facts, and that the defect in the complaint is cured by that averment. He cites Bate v. Graham (11 N. Y. 237). But there the allegation in the answer was the affirmation of the very fact which was objected, the complaint should have averred. There the omission from the complaint was of an allegation that the defendant maintained that a certain assignment of an insolvent debtor was not fraudulent.

The answer of the defendant made the very averment which was omitted from the complaint, and the omission of which was the ground of the defendant's objection to the complaint. The court well held that the complaint might have been amended; for both parties at the trial were maintaining the same fact. Here, however, the parties do not seek to maintain the same fact; and that which the answer avers is the direct opposite of that which the plaintiff must establish to recover. Would the plaintiff take the averment of the answer into his complaint as a part of its allegation? Then he would allege that he is not the owner of the property, and that the defendant has not detained it from him. And then his complaint would show him

[7] Lyon, J., in Tronson v. Union Lumbering Co., 38 Wis. 202, (1875): * * * "The averments that the taking was wrongful and the detention unjust, are mere propositions of law, and no facts are pleaded to support them."

without cause of action. (See Pelton v. Ward, 3 Caines 73.)

The same considerations are applicable to the lack of the averment of a demand and refusal; if the plaintiff's case is to depend upon a wrongful detention, without a wrongful taking in the first instance.

The case of Levin v. Russell (42 N. Y. 251) is cited by the appellant. There are two facts which make it inapplicable here. There was in it no motion to dismiss the complaint for its insufficiency; and proof was made at the trial without objection of facts making a cause of action. Again: The complaint did allege that the property was that of the plaintiff. This does not appear in the report of the case in 42 New York; and from the statement there, one would think that the complaint was without an allegation of the plaintiff's ownership. On referring to the printed case, as it is found in the series of bound volumes of cases in this court in the State Library, the averment reads thus: "The following goods and chattels *of the plaintiff*." This is in exact accordance with the precedent for a declaration in replevin. (Pattison v. Adams, *supra.*)

The judgment should be affirmed with costs to the respondent.

SHERIDAN v. JACKSON.

Court of Appeals of New York, 1878. 72 N. Y. 170.

Earl, J. On the trial of this action, after plaintiff had opened his case, the court dismissed the complaint on the ground that it did not state facts sufficient to constitute a cause of action. He did not ask for leave to amend his complaint, but he excepted to the decision and appealed to the General Term, and then to this court, insisting all the time that his complaint was sufficient. Under such circumstances the complaint must be treated here as if it had been demurred to, and the sole question to be considered here is, whether it sufficiently states a cause of action?

It alleges that plaintiff "was, on the 19th day of November, 1856, entitled to the possession of, and the rents, issues and profits thereof, and has been since and still is entitled to the same," of seventy-five lots of land in the city of Brooklyn, de-

scribing them; that on or about the 26th day of January, 1870, an action was begun in the Supreme Court between the defendants Jackson as plaintiffs and the other defendants, excepting Cameron, as defendants, and that the parties to that action claimed as between each other some interest in these premises or the rents, or profits thereof; that afterwards in that action defendant Cameron was appointed receiver of the rents, issues and profits of the said premises; that subsequently rents and profits amounting to a large sum arising from the said premises came into his hands, and that plaintiff had demanded from him the rents and profits so received by him, and had been refused; and then the plaintiff demanded relief, that the defendant Cameron account for all moneys received by him in the action in which he was appointed receiver; that he be restrained from "paying over to any person or persons, or making any disposition of the said moneys," so received, or afterwards to be received by him; "that he be required to pay the said moneys into court," or to the plaintiff, or to a receiver to be appointed in the action; that such order be made as is just; that a judgment and decree be made adjudging and requiring the said moneys to be paid to the plaintiff. No relief or judgment was demanded against any of the defendants but the receiver Cameron.

The complaint does not allege any facts showing that the plaintiff was entitled to the rents and profits. It does not allege that he owned or ever possessed the premises, or that he owned the rents. The allegation that he was entitled[8] to the possession of the land and to the rents and profits, is a mere allegation of a conclusion of law. The facts should have been alleged from which such a conclusion of law could have been drawn. (Pattison v. Adams, 7 Hill 126; Scofield v. Whitelegge, 49 N. Y. 259.)

There is a further defect. The complaint does not show any right in the plaintiff to intervene in the litigation between the

[8] An allegation that by a certain foreign law the title to property vested in the plaintiff is regarded as a statement of fact, Sultan v. Tiryakian, 213 N. Y. 429, (1913). Where, however, the foreign statute is set out in full in the pleading, its construction is for the court, and therefore the construction placed upon it by the pleader is not admitted by demurrer, Finney v. Guy, 189 U. S. 335, (1903).

defendants. There is no allegation that any of the parties to that action claimed anything therein in hostility to him, or showing that he could in any way be damaged by that litigation, or bound by anything done or adjudicated therein. What right had he then to come into court and seek to take or control the moneys which they, in a litigation between themselves, had placed in the hands of a receiver to be disposed of in that action?

There is, therefore, abundant reason for holding that the complaint did not state facts sufficient to constitute a cause of action. * * *

Judgment affirmed.

McCAUGHEY v. SCHUETTE.

Supreme Court of California, 1896. 117 Cal. 223.

SEARLS, C. This is an action to recover possession from the defendants, who are appellants here, of lots A, B, C, J, K, and L in block 131 of Horton's addition to San Diego, county of San Diego, state of California. Plaintiff had judgment, from which judgment, and from an order denying their motion for a new trial, defendants appeal.

The complaint was demurred to upon the ground, among others, that it does not state facts sufficient to constitute a cause of action. We think the demurrer should have been sustained. The complaint may be summarized thus: (1) December 22, 1891, defendants made their promissory note to plaintiff for $2,000, and to secure the payment thereof executed a mortgage upon the lots of land sought to be recovered in this action. (2) Afterwards, and on the 22d day of March, 1893, plaintiff and defendants entered into an agreement by the terms of which said defendants agreed to convey to plaintiff, and the latter agreed to take, said real property in full payment of the note, and to release defendants from liability thereon, and deliver the same up to defendants, and to discharge of record the mortgage. (3) That on the 23d day of December, 1893, defendants delivered to plaintiff their grant deed of said premises, and the latter delivered up the note and discharged the mortgage of

record. Said deed from defendants to plaintiff and the note and mortgage are made part of the complaint. (4) At the date of the delivery of the deed there was $2,501.28 due on the note, and the deed was made in payment thereof. (5) Defendants are in possession of the premises, and plaintiff has demanded possession thereof, which said defendants refused to deliver up, and exclude plaintiff therefrom against his will and right. Wherefore he demands judgment for the delivery of possession of said premises, etc. It is a fundamental rule of our code pleading that ultimate, and not probative, facts are to be averred in a pleading. Miles v. McDermott, 31 Cal. 271. In Thomas v. Desmond, 63 Cal. 426, it was said, in substance, that, where a complaint merely states the evidence from which ultimate facts are deducible, a demurrer lies. In Siter v. Jewett, 33 Cal. 92, it was held that averments in a complaint of the facts constituting a deraignment of title are but averments of evidence, and are not admitted by a failure to deny them in the answer. Recoullat v. Rene, 32 Cal. 450, is to like effect. In Gates v. Salmon, 46 Cal. 361, it was held that an allegation in a complaint that B. executed an instrument in writing, purporting to convey to T. a tract of land, which is recorded (stating where), is a mere allegation of evidence, and may be disregarded as surplusage. Such evidentiary matters should be stricken out in an action of ejectment. Wilson v. Cleaveland, 30 Cal. 192. See, also, San Joaquin Co. v. Budd, 96 Cal. 47 (30 Pac. 967). It will be observed that in the complaint in the present case there is no averment of seisin, or ownership, or possession, or right of possession to the demanded premises, but the pleader contents himself with a statement of evidentiary facts, which, if proven at the trial, would authorize the court in finding the ultimate fact of ownership[9] and right to possession in the plaintiff. In Frederick v. Tracy, 98 Cal. 658 (33 Pac. 750), it was said of such a pleading that it was insufficient, and that a complaint which stated only facts

[9] See Murphy v. Bennett, 68 Cal. 528, (1886), that, under a statute providing for a special finding of facts, a finding that plaintiff was not the owner, etc., was a finding of fact and not a conclusion of law.

Compare Greenwade v. Mills, 31 Miss. 464, (1856), to the effect that an instruction to the jury, that if they found that G. had no title to a slave their verdict should be for M., was bad as leaving a question of law to the jury.

from which the ultimate fact might be deduced was subject to a demurrer. In City of Los Angeles v. Signoret, 50 Cal. 298, the action was to enforce a lien for the construction of a sewer. The complaint referred to an exhibit, attached to and made a part thereof, for particulars, which exhibit recited the various steps necessary to create the lien, but on demurrer the pleading was held insufficient. The complaint here is argumentative; that is to say, the affirmative existence of the ultimate fact is left to inference or argument. Such pleading was bad at common law, and is none the less so under our code system. To uphold such a pleading is to encourage prolixity, and a wide departure from that definiteness, certainty, and perspicuity which it was one of the paramount objects sought to be enforced by the code system of pleading, and that, too, with no resultant effect, except to incumber the record with verbiage, and enhance the cost of litigation. We recommend that the judgment and order appealed from be reversed, and that the court below be directed to sustain the demurrer to plaintiff's complaint, and that he have leave to amend.

Per Curiam. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the court below directed to sustain the demurrer to plaintiff's complaint, and that he have leave to amend.

JACCARD v. ANDERSON.

Supreme Court of Missouri, 1862. 32 Mo. 188.

DRYDEN, Judge, delivered the opinion of the court.

The plaintiffs, as the last endorsers of a promissory note, sue the defendant, as first endorser. Their petition is as follows, viz.:

"Eugene Jaccard, Augustus Mermor, and D. Constant Jaccard, plaintiffs, v. William C. Anderson, Jr., defendant. In St. Louis Circuit court, St. Louis county.

"Plaintiffs, by Alex. J. P. Garesche, their attorney, state that they are partners, associated together as E. Jaccard & Co.; that Washington King, by his negotiable note herewith filed, dated April 16, 1856, promised to pay to defendant, or his order, one

thousand dollars, one year after date; that defendant assigned by endorsement and delivered said note to E. H. Bussell, and said E. H. Bussell assigned by endorsement and delivered same to the plaintiffs. Plaintiffs further state that said note was not protested at the defendant's instance and request, he waiving protest; that no part of said note has been paid. They further ask judgment for said sum of one thousand dollars, interest, and costs.

ALEX J. P. GARESCHE,
Attorney for plaintiffs."

The defendant answered, and a trial of the case was had, and a verdict and judgment was rendered for the plaintiffs. Several exceptions were taken in the progress of the trial, which it will be unnecessary for us to notice. In due time the defendant moved in arrest of the judgment because of the insufficiency of the petition, and the motion being overruled, he excepted and appealed to this court.

The petition is defective in not stating facts sufficient to constitute a cause of action. In order to render an assignor liable to the assignee it must appear by the petition, either that the note assigned is negotiable, or if not negotiable, that the maker was insolvent or non-resident of the state; or that the assignee, in the diligent prosecution of a suit against the maker, had been unsuccessful in making the debt. It does not appear by any averment or fact in this case that the note assigned was a negotiable instrument, nor are such facts shown as are necessary to impose a liability upon the defendant as assignor of a note not negotiable. True, it is stated, or rather recited in the petition, that the note is negotiable; but this is the statement of the conclusion or opinion of the pleader, not the averment of a fact upon which issue could be taken or the judgment of the law be pronounced. The operative words in a negotiable note under the law of this state are "for value received, negotiable and payable without defalcation," and their employment in the instrument declared upon must appear in the petition in order to enable the court to see and pronounce the legal effect of such instrument. * * *

The court erred in overruling the motion in arrest, and for this cause its judgment is reversed and the cause remanded, with directions to permit the plaintiffs to amend their petition, if they desire to do so. The other judges concur.

FAIRBANKS v. ISHAM.

Supreme Court of Wisconsin, 1862. 16 Wis. 118.

The action was brought to foreclose a mortgage executed by the defendant Platto, who conveyed the mortgaged premises to the defendant Isham, and he was for that reason made a party defendant to the action. The defendant Isham demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause for action. The county court overruled the demurrer and the defendant Isham appealed. The points arising on the demurrer are stated in the opinion of the court.

DIXON, C. J.[10] There is no error in the case. As to the first one assigned, that it is irregular for the pleader to set out what he conceives to be the *substance* of the condition of the bond, the counsel is condemned by his own authorities. To state the substance of a written instrument is to state it according to its legal effect; and this has always been allowable. In doing so, the pleader has this danger to guard against, that he may mistake the legal effect, which if he does, there will be a variance, and the instrument will be excluded at the trial. If, however, he mistake the legal effect and yet state facts constituting a cause of action, the remedy is not by demurrer; but by objection to evidence at the hearing. If the complaint contains a statement of facts which, in judgment of law, constitute an indebtedness or liability, the demurrer must be overruled, for it admits the truth of the facts thus pleaded. As it is not contended that the facts stated are not sufficient, but only that pleading them "in substance" is not permissible, the latter question only is examined. Mr. Chitty, at the page cited by the counsel, (1 Ch. Pl. 306) says: "It frequently becomes an important question, when the party is about to set out some written instrument, whether it will be advisable to follow the *terms* of the instrument or to give merely its *substance. The latter, if given correctly, it will be a sufficient compliance with the rule, which only requires the legal effect to be stated.*" Again, "from some later cases it rather appears, that the true rule in setting out a written contract may be, that where the party professes to give the

[10] Part of the opinion omitted.

legal effect and operation of the deed, and the legal operation is different from that which appears by his statement, *a fatal variance will occur,* although he adopts the exact expressions contained in the instrument; but when he does not profess to give the exact *substance* and legal effect only, but to state *the very words*[1] of the deed, the court will then construe[2] the deed for him." In Fairbanks v. Bloomfield, 2 Duer 349, the facts upon which it was claimed that the plaintiff had a mortgage,

1 Compare Valliant, J., in Reilly v. Cullen, 159 Mo. 322: * * * "The petition itself is not beyond criticism under the rules of good pleading (although it follows what seems to have become a not unusual practice) and if it had been demurred to on the statutory ground that it did not state facts constituting a cause of action, the demurrer should have been sustained. The statute requires the facts constituting the cause of action to be stated. By this is meant the ultimate facts as distinguished from the evidentiary or argumentative facts. The statute in this respect lays down for the code pleader in clearer terms the same rule that the common law on this subject prescribes, that is, that a plea must not be argumentative. To set out in the petition in haec verba the contract on which the case is founded is to plead the evidence, not the facts. A pleader should determine in his own mind the legal effect of the written contract or other document that underlies his case, and plead it by its legal effect as he understands it, and as he purposes to maintain it. If the instrument is merely copied into the petition it leaves uncertain the issue intended to be tendered, depending on the construction that may be put upon it at the trial. Our code pleading furnishes no authority for such uncertainty. But where, as in this case, no demurrer is filed and no objection is made to the petition until the trial is on, it comes too late, if, by construing the petition then as stating what the evidence pleaded tends to prove, it constitutes a cause of action. This petition is susceptible of such construction."

2 Devens, J., in Cunningham v. Washburn, 119 Mass. 224: * * * "The legal interpretation of a contract is for the court, which is to determine, where the words are unequivocal in their meaning, what it imports and what are the obligations imposed by it. As, however, words and phrases are often used which are technical or ambiguous, and sometimes, those which, although not in themselves unintelligible, requires knowledge of the subject, in connection with which they are used, to apply them intelligently, it may be necessary to resort to extrinsic evidence to ascertain thereby the intent of the parties in using them, in order that the contract may be construed in the light of the information thus acquired. The fact thus to be inquired into are determined by the jury under the direction of the court, which instructs them as to the construction to be given to the contract according to the various aspects in which such facts may present themselves."

were not stated in substance or otherwise,[3] so as to enable the court to determine that question. And in Lienan v. Lincoln, idem 670, the decision was that there were no facts, in whatever form of statement, showing that the defendant had incurred the liability charged. Stanwood v. Scovel, 4 Pick. 422, presents the common case of variance arising upon objection to evidence. The point of pleading involved in Adams v. The Mayor, 4 Duer 295, was, whether it was necessary for the plaintiff to aver compliance with conditions precedent, the performance of which he was bound to prove in order to entitle himself to a verdict. It was held that the conditions "should be set out at length *or in substance*," with proper averments to show that they had been complied with. * * *

Judgment affirmed.

LEACH v. RHODES, ADM'R.

Supreme Court of Indiana, 1874. 49 Ind. 291.

Downey, J. This was a claim filed by the appellants against the appellee. It is in the form of a regular complaint. In it the claim is stated, in substance, as follows: That the deceased held two promissory notes against Thomas H. Ellison, secured by a mortgage on an interest in a grist-mill and small piece of land; that the deceased sold and delivered the notes to the plaintiffs "for a full and valuable consideration," and agreed and guaranteed the prompt payment of the same, and that he would collect the notes and pay the amount over to the plaintiffs, if not paid by the maker. It is then averred that the deceased instituted an action on the notes and mortgage, and recovered a judgment against Ellison for the amount of the notes and for a foreclosure of the mortgage; that the mortgaged premises were sold and purchased by the plaintiff Moore, who paid therefor forty dollars, thirty-one dollars of which went to pay the costs in the action; that Moore sold the land, so purchased by him, at private sale for one hundred dollars, which sum was

3 Statutes usually require the instrument sued on, or a copy of it, to be filed with the complaint.

credited on the debt; that Ellison is insolvent; that the balance due of the debt is four hundred and sixty-two dollars and interest, which remains unpaid, etc.

Answer in ten paragraphs. Demurrers filed to all of the paragraphs, except the first, which was the general denial. Demurrers sustained to all the paragraphs except the fifth, eighth, ninth and tenth, to which the demurrers were overruled. Issues were formed, and there was a trial by the court, finding for the defendant, motion for a new trial overruled, and judgment for the defendant.

The overruling of the demurrers to the fifth, eighth, ninth and tenth paragraphs of the answer is the first alleged error.

We think there was no error in this ruling, because we think the complaint is substantially defective. To constitute a valid contract, there must be a consideration. In stating a contract in a pleading, the consideration must be stated, as well as the promise, in every case except where the pleading is upon a deed, bill of exchange, promissory note, or other instrument in writing which imports a consideration. In this case, the action is not upon the notes which were sold by the deceased to the plaintiffs, nor upon any endorsement of them, nor any other instrument in writing importing a consideration. But it is upon a parol or oral contract. It was necessary, therefore, to state a consideration for the promise of the deceased. In alleging a consideration, the particular facts must be stated. It will not do to say, "for a full and valuable consideration" the deceased promised, etc. The code has not changed this rule of pleading in those cases in which it is necessary to allege a consideration. It is a conclusion of law to allege that there was a full and valuable consideration, without stating the particular facts. It is for the court, and not the pleader, to decide whether or not the facts stated show a consideration.[4] Brush v. Raney, 34 Ind. 416.

"The consideration must either appear impliedly from the

[4] Compare Bk. v. Ger. Ins. Co., 72 Wis. 535, (1888), to the effect that an allegation that defendant for a valuable consideration entered into the contract, etc., was sufficient against general demurrer, though subject to a motion to make more specific.

See, also California Packing Co. v. Kelly, 228 N. Y. 49, (1920), holding such an allegation sufficient as "a plain and concise statement of the ultimate principal and issuable fact of consideration."

instrument itself, as a promissory note or bill of exchange, or the complaint must expressly state the particular consideration on which the contract is founded. And it is essential that the consideration stated should be legally sufficient to support the promise for the breach of which the action is brought." Moak's Van Santvoord Pleadings, 217, star paging. See, also 1 Chitty Pl. 292, *et seq.;* 1 Saunders Pl. & Ev. 187, *et seq.*

These authorities point out the difference between executed and executory considerations, and give the rules for alleging each. But we need not consider the subject in its details, as, in this case, no attempt is made to state the nature and particulars of the consideration, or to show whether it was of the one kind or the other. We need not examine any other questions made in the case.

Judgment affirmed.

KERR v. STEMAN.

Supreme Court of Iowa, 1887. 72 Ia. 241.

Action to recover damages alleged to have been sustained by reason of the fraudulent representations of the defendant, by which the plaintiff, Eliza A. Kerr, was induced to sell and convey certain real estate. The defendant moved that the plaintiff be made to make a more specific statement of the facts constituting the fraud. The court sustained the motion. The plaintiff elected to stand upon her petition. Judgment was rendered against her for costs, and she appeals.

Adams, C. J. The petition shows clearly enough that the plaintiff was at one time the owner of certain real estate consisting of a town lot and an undivided third of a tract of 40 acres; that she employed the defendant to make an exchange of the same for other property; that he reported that he had negotiated an exchange, stating the terms, and she executed the required conveyances. The petition further states that the defendant made a false report, with the intent to cheat and defraud her; but wherein the same was false does not appear. She should have set out in what the falsity consisted, in order that the defendant might know what he should come prepared to

disprove. The doctrine is elementary that whoever sets up a fraud must do more than allege fraud in general and abstract terms. He must set out the specific facts in which the fraud consists. The petition in this case seems to us to be clearly insufficient, and we think that the court did not err in sustaining the defendant's motion for a more specific[5] statement.

Affirmed.

PEHRSON v. HEWITT.

Supreme Court of California, 1889. 79 Cal. 598.

THORNTON, J. The plaintiffs bring this action to have certain judgments, and the executions issued thereon, and the levies made under them, vacated and set aside; that an adjudication in insolvency may be vacated, and the proceedings dismissed; and for an injunction restraining certain defendants, etc., from selling certain property described in the complaint. The defendants contend that the complaint does not state facts sufficient to constitute a cause of action, and that, therefore, the judgment and order denying a new trial should be reversed. The defendants demurred to the complaint on the above-stated ground. The complaint sets forth that the defendant Hewitt was indebted to the several plaintiffs in several sums for divers matters; that they commenced actions against Hewitt in a justice's court to recover these amounts, and sued out writs of attachments, which

[5] In Cohn v. Goldman, 76 N. Y. 284, (1879), a complaint was held bad on general demurrer, where it merely alleged that defendants, "by connivance, conspiracy and combination, did cheat and defraud the plaintiff out of eight bales of Havana tobacco." In Hall v. Hall, 225 N. Y. 342, (1919), an allegation that defendant fraudulently represented to plaintiff that it would be to his interest to execute an assignment, was held insufficient on general demurrer.

In Gay v. Gregory, 140 Ky. 266, (1910), it was said in holding a similar complaint insufficient. "It was her (plaintiffs) duty to allege the substance of the acts and conduct of the appellee which she considered wrongful and fraudulent, to apprise appellee of her contention, and in order that the court might determine whether they were such as would make appellee liable for her alleged loss."

And so in Church v. Swetland, 243 Fed. 289, (1917),

were levied by the sheriff of the county upon the property of defendant Hewitt, set forth in the complaint; that before the commencement of these actions Hewitt filed in the same justice's court certain pretended confessions of judgment in favor of several defendants for certain amounts alleged to be due to each of the defendants, which confessions of judgment were accepted by the several defendants in whose favor they were made. Plaintiffs further allege that said pretended confessions of judgment were made by Hewitt and accepted by defendants with the intent and design of hindering, delaying, and defrauding the plaintiffs and other creditors of Hewitt by a combination among them, by which they were to levy executions upon all the property of Hewitt, and have the same sold for the amount of said confessions to said defendants, or some of them, and that after said sale had been made that Hewitt was to be placed again in full possession and control of the property for his own use and benefit, and fraudulently protected by such proceedings against the claims of plaintiffs, and thus rendering any judgments which plaintiffs might recover against Hewitt ineffectual. It is further averred that executions afterwards issued on the judgments above mentioned, and came into the hands of the defendant Eckels, who was a constable, and that the constable made a pretended levy under the said executions on the property above mentioned; that this levy was made and abandoned prior to the levy of the attachments of plaintiffs above set forth, and that since the abandonment the constable has never had possession or control of any of the property above referred to; that the constable pretends that the levies made by him are in full force, and that he is proceeding to sell said property under these levies. The defendant Hewitt is insolvent and was insolvent when he made the confessions of judgment above stated, and that in furtherance of the above stated agreement by defendants, and to carry out and complete the fraudulent scheme of defendants, did, on the 16th of March, 1886, file his petition in insolvency; that this petition was not filed in good faith, but for the wrongful and fraudulent purposes of defeating the attachment liens of plaintiffs, to the end that the pretended levies of the executions might hold the property, and a sale of the same might be made in such manner as to fraudulently cover it, and protect it from the claims of plaintiffs.

We see no element of fraud by defendants in the matters

averred in the complaint. It is not averred that the debts for which the judgments were confessed by Hewitt, in favor of the several defendants, were not justly due by Hewitt to them. Styling the confessions of judgments "pretended," as was done by the plaintiffs in the complaint, did not show that they were so. The facts should have been set forth from which it would appear that they were pretended and simulated, and not real and genuine. There was no law in existence when the confessions were made which prevented Hewitt from confessing a judgment in favor of a *bona fide* creditor, and there is nothing alleged in the complaint which tends to show that the defendants were not honest creditors to whom Hewitt was justly indebted. The word "pretended" is a mere epithet, which, in the absence of facts showing the pretended character of the confessions or of the judgments, imports nothing impugning either the confessions or the judgments. It sufficiently appears that confessions of judgments were filed in the justice's court, that judgments were entered on them, and executions issued on the judgments. It is not sufficient to allege that confessions or judgments are fraudulent, but the facts showing that they are such must be averred, so that the court can perceive that such instruments are fraudulent.[6] The facts showing the fraud must be made to appear by averment. See Kinder v. Macy, 7 Cal. 206; Harris v. Taylor, 15 Cal. 348; Meeker v. Harris, 19 Cal. 289, 290.

The debts for which the judgments were confessed being justly due by Hewitt, we see no fraud in the defendants agreeing to buy the property at the sale had on their executions, and, if they did buy it, giving it to Hewitt, if they elected to do so. To hold that they could not do so would be to hold that a man could not do what he chooses with his own property. The defendants, if they bought at the sale under execution, would pay their own money for the property bought, and when so bought and paid for it would belong to them, and they could do with it what they chose to do. They might give it away to Hewitt or any one else, or might destroy it if they saw fit. We cannot see how a court of equity can set aside an adjudication in insolvency or dismiss such a proceeding. It is averred that Hewitt was insolvent, and if so he had a right to apply for a discharge under the statutes in relation to insolvency. There can be no fraud in the pursu-

[6] But see Laun v. Kipp, 155 Wis. 347, (1914).

ance of a remedy allowed by law. Hewitt, in applying for his discharge in insolvency, was taking the steps provided by law for having his property equitably and fairly subjected to the satisfaction of his creditors. Of this, no creditor has a right to complain. If he has no right to apply to be discharged from the claims of his creditors, they will have an opportunity of showing that, and preventing his discharge, in the insolvency proceeding. If the confessions of judgment made to defendants are prohibited by the insolvent laws, the assignee in insolvency can have them adjudged void, and on a proper proceeding they will be so adjudged, but no such proceeding is before us in this case. As the agreement made by defendants described above was free from fraud, we cannot see that the application in insolvency to carry out such arrangement could or would be fraudulent. We are of opinion that the complaint does not state facts sufficient to constitute a cause of action, and therefore the judgment and order are reversed, and the cause remanded, with directions to the court below to sustain the demurrer to the complaint, and for other proceedings according to law.

NICHOLS v. NICHOLS.

Supreme Court of Missouri, 1896. 134 Mo. 187.

Macfarlane, J. A demurrer to plaintiff's amended petition was sustained and from the judgment thereon in favor of defendants she appealed. The petition was as follows:

"For amended petition herein, plaintiff complains and alleges that on the eleventh day of February, 1892, she was lawfully married to and became the wife of George Nichols. That from the date of said marriage till the —— day of March, 1893, she and her said husband, George Nichols, continued to live together as husband and wife. That during all that time plaintiff faithfully demeaned herself and discharged all her duties as the wife of said George Nichols; and she and her husband lived happily together and enjoyed the aid, support, companionship, society, and affection of each other.

That the defendants, well knowing that plaintiff and George Nichols were husband and wife, and that they were living hap-

pily together, enjoying the aid, support, companionship, society, and affection of each other, wrongfully, wickedly, and maliciously acted and co-operated together, with the wrongful, wicked, and malicious intent to cause plaintiff's said husband to leave and abandon her, and to cease living with plaintiff as her husband, and to deprive plaintiff of the aid, support, companionship, society, protection, and affection of her said husband; and on the —— day of March, 1893, the defendants, pursuant to their said wicked, wrongful, and malicious intent, did wrongfully, wickedly, and maliciously entice, influence, and induce plaintiff's said husband to leave and abandon her; and her said husband, being influenced by and acting under the said wrongful, wicked, and malicious enticement, influence, and inducement of defendants, did then leave and abandon her, and being influenced by and acting under said wrongful, wicked, and malicious enticement, influence, and inducement, has ever since remained away from and separate and apart from her. And ever since said abandonment, the defendants have wrongfully, wickedly, and maliciously detained and harbored plaintiff's said husband, and have kept him separate and apart from her; and have by their said wrongful, wicked, and malicious acts and conduct deprived plaintiff, and still do deprive her, of the aid, support, companionship, society, protection, and affection of her said husband.

Wherefore, plaintiff says she is damaged in the sum of ten thousand dollars ($10,000), for which sum and for costs she prays judgment."

Each defendant filed a separate demurrer, assigning as grounds thereof the following:

"1. Because the petition on its face fails to state any cause of action against this defendant.

"2. Because the petition fails to state or set out in detail the facts which it is claimed caused George Nichols, husband of plaintiff, to separate from her, and live separate and apart from her, plaintiff.

"3. Because there is a defect of parties plaintiff in this, that if any cause of action is stated, George Nichols is a necessary party plaintiff."

The demurrers were sustained, and plaintiff declining to plead further, final judgment was rendered for defendants.

I. The right of a wife to maintain an action for damages

against a third person for alienating the affections of her husband and thereby depriving her of his comfort and society has been affirmed by this court since this judgment was rendered. Clow v. Chapman, 125 Mo. 103. * * *

II. Was the demurrer properly sustained upon the second ground stated? Does the petition state facts sufficient to constitute a cause of action?

The substantial charge in the petition is that defendants wrongfully enticed, influenced, and induced plaintiff's husband to abandon her and to live separately and apart from her, thereby depriving, and intending to deprive, her of his affection, comfort, society, and support. Defendants insist that this is but a statement of a conclusion of law, that the acts done and words spoken should have been stated.[7]

The code requires the facts which constitute the cause of action to be stated. A statement of mere legal conclusions is not sufficient, and, on the other hand, a detailed statement of the evidence is not required. Difficulty is sometimes experienced in drawing the line between a statement of fact and a conclusion of law, and between a statement of the ultimate fact and a statement of the evidence by which such fact is to be established.

It may be stated generally that the ultimate, constitutive, and issuable facts must be stated. Issuable facts are defined to be "those upon which a material issue may be taken." Evidential or probative facts, which should not be stated, are those upon which a material issue[8] cannot be taken and from which the is-

7 In Winsmore v. Greenbank, Willes, 577 (C. P. 1745), which was a similar action by the husband, it was urged in arrest of judgment that the declaration was insufficient in alleging generally that the defendant unlawfully and unjustly procured, etc., and that the particular acts should have been stated.

Willes, L. C. J.: * * * "It is not necessary to set forth all the facts to show how it was unlawful; that would make the pleadings intolerable, and would increase the length and expense unnecessarily. * * * In answer to the objection that this is leaving law to the jury, it must be left to them in a variety of instances where the issue is complicated."

8 Payne, J., in Rogers v. Milwaukee, 13 Wis. 610, (1861): * * * "It is undoubtedly true that a larger part of the complaint is not good pleading. The plaintiff relied on an absence of preliminary proceedings, essential to the validity of the tax sales. But instead of averring either of his own knowledge or upon information and belief that such proceedings were not had, he only averred that

suable facts may be inferred. Bliss on Code Pleading (3d Ed.) sec. 206.

Pomeroy says: "The material facts which constitute the ground of relief * * * should be averred as they actually existed or took place, and not the legal effect or aspect of those facts, and not the mere evidence or probative matter by which their existence is established." Pom. Rem. Rights (2 Ed.), sec. 517.

Again the same author says: "The allegations must be of those principal, determinate, constitutive facts, upon the existence of which, as stated, the entire cause of action rests, so that, when denied, the issue thus formed with each would involve the whole remedial right." Section 526.

The ultimate fact which is constitutive of the cause of action in this case is that of wrongfully inducing the husband of plaintiff to abandon her. The methods adopted to accomplish that purpose are mere matters of evidence from which the ultimate fact is proved or may be inferred. Various methods may have been adopted to accomplish the purpose, and a denial of them, if stated, would not form a single issue involving the whole remedial right. They would be probative, and not constitutive, facts. In the opinion of the jury an inference that defendants wrongfully induced plaintiff's husband to leave her might not be drawn from one or more acts proved, but might readily be drawn from them all taken in the aggregate. No issue could, therefore, be made upon each act and statement of defendants that would conclude the right of plaintiff to recover.

Wrongfully inducing plaintiff's husband to abandon her is a conclusion of fact depending upon the proof of acts, declarations, and conduct of defendants. It is not a conclusion of law, but a fact from which a legal conclusion is to be drawn. That legal conclusion was questioned in the first ground of the demurrer. Judgment reversed and cause remanded. All concur.

he had searched in the proper offices for the evidence that they were had, and failed to find it. The only issue that could be made upon such allegations would be whether he had searched and found the evidence or not, which would be entirely immaterial."

SCHUBERT v. RICHTER.

Supreme Court of Wisconsin, 1896. 92 Wis. 199.

The complaint alleges, in effect, that on March 1, 1894, the firm of Richter, Schubert & Dick, then conducting a general real-estate, loan, and insurance business, in Milwaukee, as co-partners, made their promissory note in writing, bearing date on that day, for $2,274.33, payable one year after date, to one Joseph Flanner, with interest, and thereupon delivered the same to said Flanner for full value; that thereafter, and before maturity of said note, said Flanner sold and delivered the same to this plaintiff; that on August 1, 1894, said partnership expired by limitation, and thereafter the plaintiff and defendant each entered into business for himself in the same line of business as had formerly been conducted by the firm; that, to supply capital therefor, the plaintiff had negotiated with the First National Bank of Milwaukee for a loan upon said note to the amount thereof; that the defendant, with intent to injure and impair the business credit of the plaintiff, and to prevent him from obtaining credit on said note, warned the cashier of said bank not to discount or purchase said note from the plaintiff,—thereby giving the cashier to understand that he repudiated his obligation on said note, that the possession thereof by the plaintiff was wrongful and felonious, and that the plaintiff was not entitled to sell, assign, or transfer said note to the bank; that the defendant gave the cashier to understand, by inference and by direct charge, that said note was without value and that the plaintiff had no right to the possession thereof and no property therein, and that he was attempting to obtain the money of said bank fraudulently; that in consequence of such warning the bank refused to accept said note, or to advance any money thereon, or to extend any credit to the plaintiff; that by reason thereof the credit of the plaintiff was ruined at said bank and other money institutions in Milwaukee, and hence he was unable to obtain capital with which to conduct business; that by said act the defendant intended to injure the business reputation of the plaintiff; and that such acts were done, and such warnings and statements made, by the defendant falsely and maliciously and with intent to injure the plaintiff, and by reason whereof the

plaintiff was injured in his business and reputation, and for which he claims damages.

From an order sustaining a demurrer to such complaint for insufficiency, the plaintiff appeals.

CASSODAY, C. J. The complaint entirely fails to state or allege what particular words were spoken by the defendant which the plaintiff claims were defamatory. It merely states the pleader's inferences or conclusions, drawn from something supposed to have been said, but not alleged. "The words[9] in which the slander is conveyed must be stated in the complaint, in order that the court may judge whether they constitute a ground of action, and also because the defendant is entitled to know the precise charge against him, and cannot shape his case until he knows. It is not sufficient to set forth the tenor or effect of the words used by the defendant." 13 Am. & Eng. Ency. of Law, 456. This is not only elementary, but has frequently been sanctioned by this court. Zeig v. Ort, 3 Pin. 30; K—— v. H——, 20 Wis. 239; Simonsen v. Herold, 61 Wis. 626; Pelzer v. Bonish, 67 Wis. 291; Schild v. Legler, 82 Wis. 73. It follows that the demurrer was properly sustained.

Judgment affirmed.

GRIGGS v. CITY OF ST. PAUL.

Supreme Court of Minnesota, 1864. 9 Minn. 246.

WILSON, J. To the complaint in this case the defendant interposed a general demurrer. It becomes necessary for us therefore to inquire whether the facts alleged in the complaint show that the plaintiffs have a cause of action. The gist of the action is the invalidity and worthlessness of certain "certificates" delivered to the plaintiffs in payment for work and labor by them performed. The allegations of the complaint on this point are, "that by reason of gross negligence of said commissioners, and of all the defendant's agents in that behalf, in causing to be

9 The plaintiff is accordingly required to prove the exact words alleged, or enough of them to sustain the charge; different phraseology, though to the same effect, will not support the action, Christal v. Craig, 80 Mo. 367, (1883).

made an estimate of the whole expense of such work, and of the proportion to be assessed and charged to each lot, and of the number of cubic yards to be filled in and excavated in front of each lot, and in not causing such estimate to be filed with the then city comptroller of said city, for the inspection of the parties interested, each and all of the said certificates at the time of said tender and delivery were utterly worthless, and no lien upon, nor collectible out of, the lots therein described in any manner," etc.

There is hardly a single *traversable fact* alleged. The statement that said certificates are worthless and no lien upon nor collectible out of said lots is a conclusion of law, and therefore not admitted by the demurrer. "The gross negligence of the defendant's agents" does not necessarily render the defendant liable to an action. The acts of either omission or commission injurious to the plaintiffs (if they were such) by which such negligence was manifested, should have been specifically averred in the complaint. They were part of the facts constituting the plaintiff's cause of action, and therefore it was incumbent on them to *allege* and *prove* them.

The *inference,* we think, to be drawn from the language of the complaint above quoted is that the "estimate" was made, but in a negligent manner, and that it was filed, but not with the "then" city comptroller. The point of time intended to be fixed by the pleader by the use of the language "the then city comptroller," is not apparent, and as the object of this suit is to show the *"certificates"* to be void, not merely *less* valuable on account of negligence of defendant's agents, the time of filing the "estimate" may be a *material fact,* and it therefore should have been alleged. See Nash v. City of St. Paul, 8 Minn. (179); id. (184-5.)

But we do not wish to here intimate any opinion on the question of the validity of these "certificates." Such question is not properly before us. It is not required of either the defendant or the court to spell out from inferential statements or recitals the meaning of the complaint. *Every fact* which the plaintiff must prove to enable him to maintain his action, and which the defendant has a right to controvert in his answer, must be *distinctly averred,* and a conclusion of law not justified by the

facts[10] stated is irrelevant and nugatory. Hall v. Bartlett, 9 Barb. 301; Allen v. Patterson, 7 N. Y. 478; Boyce v. Brown, 7 Barb. 85; Garvey v. Fowler, 4 Sandf. 665; Smith v. Leland, 2 Duer. 508-9; Jones v. Phoenix Bank, 8 N. Y. 238; Lienan v. Lincoln, 2 Duer. 672; Laurence v. Wright, id. 674-5; Mann v. Morewood, 5 Sandf. 564; City of Buffalo v. Holloway, 7 N. Y. 498; Schenk v. Naylor, 2 Duer. 675.

The law on this subject is very clearly laid down by Mr. Justice Duer, in case of Mann v. Morewood, in the following language: "The language of this court, and I believe of all its judges, from the time the Code has been in operation, has been uniform, that a complaint must set forth all the material and issuable facts which are relied on as establishing the plaintiff's right of action, and not the inferences from those facts which under the advice of his counsel he may deem to be the conclusion of law. To draw proper conclusions from the facts which are relied on as constituting a cause of action, or a valid defense, is the exclusive province and duty of the court, and to enable the court to discharge that duty, the fact themselves, not the conclusions that are supposed to flow from them, must be stated in the pleading."

The demurrer only admits the *traversable facts,* not inferences or conclusions of law. Moss v. Riddle, 5 Cranch 351; Hall v. Bartlett, 9 Barb. 301; Ford v. Peering, 1 Ves. Jr. (Sumner's ed.) 77, and cases cited in note; City of Buffalo v. Holloway, 7 N. Y. 493. The demurrer we think was well taken, and the order of the court below overruling it is reversed.

Judgment reversed.

[10] Folger, J., in Lange v. Benedict, 78 N. Y. 12, (1878): * * * "The plaintiff makes a preliminary point, that inasmuch as the complaint avers that the defendant wrongfully and willfully, and without jurisdiction, falsely imprisoned the plaintiff, that, therefore, as a technical rule of pleading, the demurrer having admitted the allegations of the complaint, there must be judgment for the plaintiff. But the complaint does not rest satisfied with that general allegation. It rests the general allegation upon the special circumstances afterwards set forth in it, and which are made up of all or nearly all the facts which we have above recited. So we have to consider them as well as the general allegation, and to treat the general allegation as no broader or more effectual than the special circumstances upon which the complaint rests it."

L. & N. R. R. CO. v. WOLFE.

Court of Appeals of Kentucky, 1882. 80 Ky. 82.

JUDGE HARGIS delivered the opinion of the court.

It is alleged in substance by the appellee that there was a hole in the platform connected with the appellant's depot; that the opening, and its dangerous character, were known to the appellant, but it negligently, wantonly, and willfully, failed and refused to repair it, and while removing a box of freight from said depot to his wagon, having necessarily to pass over said hole, he fell into it, and broke the left patella or knee cap of his leg, for which he prayed damages.

From a judgment, upon a verdict of $2,000 in favor of appellee, the appellant prosecutes this appeal, and raises the question, first, upon the pleadings, that the facts constituting contributory negligence, which it pleaded, were not denied, and therefore no verdict or judgment should have been rendered in appellee's behalf.

The allegation of the answer is, "that the plaintiff had full knowledge of such defect, and with his eyes wide open, and in open broad daylight, walked into said hole, and by his own negligence contributed to said injury, and thereby he alone is responsible for his misfortune."

To this the appellee replied, that "the plaintiff, Wm. R. Wolfe, for reply to defendant's answer, denies that he was guilty of any negligence at or before the time of the injury complained of in this petition, or that he contributed in any way by his negligence to the occurrence of said injury. He denies that defendant is relieved from responsibility for their gross and willful neglect by reason of any negligence on the part of the plaintiff."

It is contended by counsel that the reply fails to deny the substantive facts[1] constituting contributory negligence, and only

[1] Smith, P. J., in Carpenter v. McDavitt, 53 Mo. App. 393, (1893): * * * "In Gurley v. Railroad, 93 Mo. 445, it was stated that a petition which states generally that plaintiff was injured by the negligence of defendant would be worthless, and that the acts which it is intended to be shown were negligently done should be set out with a reasonable degree of particularity and in some appropriate form of expression charged to have been negligently done. And sim-

traverses the averment of negligence, which is but denying a legal conclusion.

The error in this position lies in the assumption that the allegation of negligence is a mere legal conclusion, and that the supposed substantive facts constitute contributory negligence, neither of which is true.

Negligence is the ultimate fact to be pleaded, and it forms *part of the act* from which the injury arises, or by which contributory negligence is made out. It is the absence of care in the performance of an act, and is not merely the result of such absence, but the absence itself, and it is not, therefore, a mere conclusion of law, and may be pleaded generally. Although the appellee, with his eyes open and in broad daylight, walked into the "hole," these facts alone would not constitute neglect, but if done intentionally or negligently they would do so. Nor does the fact that the appellee knew the "hole" was in the "floor," when added to those named, constitute negligence, as want or absence of care must be averred in some form, as it is one of the essential facts necessary to such a defense.[2]

The issue formed by the reply was material. (42 Iowa 378; 34 Mo. 235; 14 N. Y. 310; Bliss on Code Pleading, sec. 211.) * * *

Judgment affirmed.

OMAHA & R. V. RY. CO. v. WRIGHT.

Supreme Court of Nebraska, 1896. 47 Neb. 886.

IRVINE, C. The defendants in error brought this action against the railway company to recover damages on account of cattle belonging to them, killed and injured by a train of the railway company. The petition, while it is in one count, really alleges or attempts to allege three grounds of recovery: First,

ilar rulings have been made in other cases. * * * These cases make a distinction between the acts and the facts constituting the negligence. It seems that it is necessary to set out the former but not the latter."

And so in Cederson v. O. R. & N. Co., 38 Ore. 343, (1900).

[2] For another view of negligence, see Holmes, Law in Science, etc., 12 Harvard Law Rev., 443.

that a gate on one of the fences along the right of way was insufficient, and negligently permitted to be out of repair, and that, by reason of those facts, the cattle got upon the right of way; second, that after they got upon the right of way, their injury resulted from the careless operation of the train; third, that the railway company, after the stock was injured, took possession of the dead bodies and the injured cattle, and refused to permit the owner to retake them,—that is, a charge of conversion. The answer of the railway company was a series of denials,—some of them negatives pregnant, but the whole effect practically that of a general denial,—coupled with some affirmative allegations in regard to the security of the gate and negligence on the part of the plaintiffs. From a verdict and judgment in favor of the plaintiffs for $569, the defendant prosecutes error. * * *

It is quite clear, under the instructions of the court, that the verdict turned upon the negligence of the railway company in operating its train, whereby the cattle were killed and injured after they came upon the right of way. On this branch of the case the allegations of the petition are that the defendant, "by its agents and employees, while running at a high rate of speed, carelessly and negligently, and without using due caution, ran the engine and train of cars connected therewith and attached thereto over and upon the cattle of these plaintiffs; * * * that the said defendant carelessly and negligently, by its employees and servants, in operating said train, ran their said engine and train in, over, and upon said plaintiffs' stock, when, by exercising proper care and skill in the management and handling of its engine and train, it could have stopped said train long before striking said plaintiffs' stock." An allegation of negligence or want of care is like an allegation of fraud. It is a bare conclusion. A pleading is not sufficient which merely in general terms charges a want of due care or negligence. It is necessary to plead the facts from which an inference of negligence arises. Railroad Co. v. Grablin, 38 Neb. 90 (56 N. W. 796), and (57 N. W. 522); Malm v. Thelin, 47 Neb. 686, 66 N. W. 650. The petition merely alleges that the lefendant neg-

ligently ran over the stock, while by the use of proper case it might have stopped the train before striking the cattle.

Judgment reversed.[3]

CLARK v. C., M. & ST. P. R. R. CO.

Supreme Court of Minnesota, 1881. 28 Minn. 69.

MITCHELL, J. This is an appeal from an order sustaining a demurrer to the complaint. The ground of demurrer was that the complaint did not state facts sufficient to constitute a cause of action. The here material allegations of the complaint are as follows: "That on the 6th of September, 1880, the servant of the plaintiff was lawfully traveling in a wagon drawn by two horses, all the property of the plaintiff, along the public highway in the town of Carlston, in the county of Freeborn, which public highway crosses the railroad operated by said defendants near the section line between sections 29 and 32 in said township; that as said servant of this plaintiff reached said crossing the defendants herein, by the culpable carelessness, negligence, unskillfulness and mismanagement of said defendants and their employees, wrongfully run a locomotive, with a train of cars thereto attached, used and employed by defendants in operating said road, against plaintiff's said horses, and threw them down, killing one of them immediately, and so severely injuring the other as to render him practically worthless."

It is urged that it is not sufficient to allege that an act was done negligently or carelessly; that this is merely a conclusion of law, and not a statement of an issuable fact; that the physical

[3] On rehearing, 49 Neb. 456, this opinion was disapproved, and the rule stated as follows: "That a general allegation of negligence is good against a demurrer; and under such an allegation evidence of any fact which contributed to the injury sued for is competent and relevant, but where a pleader relies upon one or more specific acts or omissions as negligent, then evidence of any act or omission not within some of such specifications is irrelevent."

Compare Vinje, J., in Emond v. Kimberly, 159 Wis. 83, (1914): * * * "To allege that a thing is unsafe without specifying how or why it is unsafe is tantamount to an allegation that a person is negligent without stating the facts constituting the negligence."

facts constituting the negligence must be alleged. It is, of course, an elementary rule of pleading that facts, and not mere conclusions of law, are to be pleaded. But this rule does not limit the pleader to the statement of pure matters of fact unmixed with any matter of law. When a pleader alleges title to or ownership of property, or the execution of a deed in the usual form, these are not statements of pure facts. They are all conclusions from certain probative or evidential facts not stated. They are in part conclusions of law and in part statements of facts, or rather the ultimate facts drawn from these probative or evidential facts not stated; yet, these forms are universally held to be good pleading. Some latitude therefore must be given to the term "facts" when used in a rule of pleading. It must of necessity include many allegations which are mixed[4] conclusions of law and statements of facts, otherwise pleadings would become intolerably prolix, and mere statements of the evidence. Hence, it has become a rule of pleading that while it is not allowable to allege a mere conclusion of law containing no element of fact, yet it is proper, not only to plead the ultimate fact inferable from certain other facts, but also to plead anything which, according to the common and ordinary use of language, amounts to a mixed statement of facts, and of a legal conclusion. It may not be possible to formulate a definition that will always describe what is a mere conclusion of law, so as to distinguish it from a pleadable, ultimate fact, or that will define how great an infusion of conclusions of law will be allowed to enter into the composition of a pleadable fact. Precedent and analogy are our only guides. And it is undoubtedly

[4] "A difficulty in distinguishing between propositions or questions of law and of fact occurs in two classes of cases; and first, in what are correctly called mixed propositions or questions. Such a proposition arises when two or more distinct and separate propositions of different characters are combined in one expression, and yet each one is capable of being detected by analysis and separately stated. The mixture is caused entirely by abbreviation; it is a mere matter of the use of language. For example, the proposition that A and B are partners includes in a condensed form the statement of fact that they have done certain acts, such as making a written agreement in certain terms, and the statement of law that the legal effect of those acts is to put them into the condition of being partners."

Terry, Anglo-American Law, § 66:

true that there will be found a want of entire judicial harmony in the adjudicated cases as to what are statements of fact and what are mere conclusions of law. And in holding one class of inferences as facts to be pleaded, and another as conclusions of law to be avoided, courts may have been often governed more by precedent than by a substantial difference in principle. But it has been quite generally held that the question of negligence in a particular case is one of mingled law and fact; that when we speak of an act as negligent or careless, according to the common use of language, we state, not simply a conclusion of law, but likewise state an ultimate fact inferable from certain other facts not stated.

Therefore, it has been generally settled by precedent and authority that a general allegation of negligence or carelessness, as applied to the act of a party, is not a mere conclusion of law, but is a statement of an ultimate fact allowed to be pleaded. Such a general form of alleging negligence, seems to have been permissible in common law pleading. Some of the forms of declarations given by Chitty, when stripped of mere superfluous verbiage, amount to nothing more than this. See 2 Chitty on Pleading, 650; also Bliss on Code Pleading, § 211; Grinde v. C., M. & St. P. R. R. Co., 42 Iowa 377; Oldfield v. N. Y. & H. R. R. Co., 14 N. Y. 310.

Therefore, while the court on motion would, on proper showing, doubtless have the right to require this complaint to be made more definite, yet we think it was not demurrable on the grounds stated.

Another objection made to this complaint is that from the facts stated it appears that plaintiff himself was guilty of contributory negligence. It is the settled law of this state that contributory negligence of the plaintiff is matter of defense, and that plaintiff, in making out his case, need not prove the absence of it. Wilson v. N. P. R. R. Co., 26 Minn. 298.

Hence it is not necessary for the plaintiff in his complaint to negative the existence of contributory negligence on his part. It is, however, doubtless true that if his complaint stated facts which showed affirmatively that he was guilty of negligence which contributed to the injury, the complaint would be demurrable. But this complaint is not liable to any such objection; it alleges that his team was lawfully travelling along the highway at the time and place when and where the accident occurred.

It did not allege that his servant did not look out for approaching trains, nor does it appear from the facts stated that he could have seen it if he had looked, so as to raise a presumption that he failed to look. The remark made by this court in Brown v. Railroad Co., 22 Minn. 168, quoted by counsel, was made with reference to the facts and circumstances of that case as undisputably disclosed by the evidence.

Ordered reversed.

DAVIS v. HOUGHTELIN.

Supreme Court of Nebraska, 1891. 33 Neb. 582.

Norval, J.[5] This is a proceeding in error to reverse the judgment of the district court of Jefferson county, sustaining a general demurrer to the petition of the plaintiff, and dismissing the action. * * *

This is an action to recover damages for the killing of plaintiff's intestate by one Allen Ireland, who, it is alleged, was at the time in the defendants' employ. The general principle that a master is liable for injuries to third persons resulting from the negligence of the servant while in the line of his employment is familiar. It is equally well settled that a master is not responsible for the wilful and tortious act of his servant committed outside of the scope of his employment. Miller v. Railroad Co., 8 Neb. 219; Tuller v. Voght, 13 Ill. 277; Oxford v. Peter, 28 Ill. 434; Moir v. Hopkins, 16 Ill. 313; De Camp v. Railroad Co., 12 Iowa 348; Cooke v. Railroad Co., 30 Iowa 203; Carter v. Railway Co., 98 Ind. 552; Gravel Road Co. v. Gause, 76 Ind. 142; Meehan v. Morewood, (Sup.) 5 N. Y. Supp. 710; Laffitte v. Railroad Co., (La.) 8 South. Rep. 701; Fraser v. Freeman, 43 N. Y. 566; Cooley, Torts, 533 *et seq.*

The sufficiency of the petition, therefore, depends upon whether it charges that the act of killing Davis was done in the prosecution of the defendants' business, and within the range of the servant's employment. The third paragraph of the petition charges that Allen Ireland was employed by the defendants to

[5] Part of opinion omitted.

guard certain feed belonging to them upon their premises, and to seize and detain persons who might be found disturbing such feed. This is the only allegation of fact in the entire pleading relating to the nature and scope of Ireland's employment. As to the act of killing, it is averred, in effect, that the deceased had occasion to be upon defendants' premises, and while so there, said Ireland, in attempting to seize and detain said Davis, negligently, carelessly, and unlawfully shot and killed him. There is no allegation that Davis was molesting the feed, or attempting so to do, or that it was any part of Ireland's duty[6] to seize and arrest persons who happened to be upon the premises, except those who were there for a specified purpose. It is obvious that the averment in the fourth paragraph of the petition, that Ireland "was acting for said defendants in the due course of his employment as aforesaid, and, pursuant to his instructions and orders, attempted to seize and detain," is a mere conclusion, and not a statement of any fact, showing that the attempted seizure and detention of Davis was within the range and authority of Ireland's duties. Likewise the allegation in the fifth paragraph, that Davis' death "was caused by the wrongful and unlawful act, neglect, and default of said defendants," is the statement of a conclusion of law, which the demurrer does not admit. It is only facts that are well pleaded which are confessed by general demurrer. So far as the allegations in the petition are concerned, or the legitimate inferences to be drawn therefrom, Ireland's employment was exclusively in guarding and protecting the feed, and the wrong charged was something which his agency did not contemplate, and which he could not lawfully do in the name of the defendants. His business no more contemplated the seizure of a person who was upon the defendants' premises for a lawful purpose than it did the arrest and deten-

6 Gillett, J., in Ry. v. Lightheiser, 163 Ind. 247, (1901): * * * "There are instances where the word 'duty' may be used in a pleading, although perhaps not with the utmost propriety in characterizing the nature of the plaintiff's employment, as where the word is used as descriptive of an ultimate fact as to the character of the work he was required to do, as that one of the duties which plaintiff was employed to perform was to inspect, etc."

Compare Jones v. Van Bever, 164 Ky. 80, (1915); L. R. A. 1915 E. 172, that in an action against a sheriff a general allegation that his deputy made an arrest in his official capacity is a mere conclusion.

tion of a person lawfully passing along the public highway near the property, and in neither case would the defendants be liable for the act. The test of a master's liability is not whether a given act was done during the existence of the servant's employment but whether it was committed in the prosecution of the master's business. * * *

Judgment affirmed.

II. *The Facts to be Stated.*[1]

HILL v. BARRETT.

Court of Appeals of Kentucky, 1853. 14 B. Monroe 83.

Judge Marshall delivered the opinion of the court.

This is an action by petition under the code, in which the plaintiff seeks to recover the value of certain brick alleged to have been made by him on the premises of the defendants. From the written contract referred to and filed as a part of the petition, and which is thus made a part of the record, it appears that Hill undertook to make, burn, and lay for the defendants, two hundred thousand merchantable bricks, at such place as said defendants may designate at the Grayson Springs, the plaintiffs furnishing all the materials, boarding, etc., for which the defendants agreed to pay him seven dollars and fifty cents per thousand, not counting the openings in the buildings, to be paid in one, two and three years, except one hundred dollars, to be taken out in boarding at the springs. But it is provided that the defendant have the privilege of not putting up said buildings the next spring if they choose, in which event they were to

[1] Two distinct problems arise in this connection: (1) What allegations are necessary in any given case to make the pleading good on its face? The solution of this problem primarily involves a correct analysis of the substantive law involved which determines the elements essential to any given liability. (2) How far the allegations must conform to the actual facts in order to escape objection for variance?

Some phases of this problem have already been treated in a former section dealing with the "One form of Action." Ed.

pay the plaintiff four dollars and fifty cents per thousand (kiln count), in the manner and times above stated; and Hill bound himself to complete said building, or laying of said brick, on or before the first day of the next June, provided said defendants notify him by the first day of the next March, of their intention to have said brick laid the next spring. But the defendants undertook to build the foundation on which the said bricks were to be laid, in time for laying the brick the next spring, provided they elect to build.

The plaintiff, without setting out any part of this agreement in the petition, but stating that one was entered into by the parties, in August, 1849, avers, that after its date, he made and burnt on the premises of the defendants, in the year 1849, one hundred and seventy thousand merchantable bricks; that they were not laid and put into a house, because the defendants did not notify him that they intended to have the building put up, and did not have the foundation laid in time for him to build the said house by the first day of June, 1850, or any other time, but they elected that they would not build said house, whereby he was prevented from making and laying the two hundred thousand bricks contracted for; and he claims payment for the one hundred and seventy thousand bricks at the rate of four dollars and fifty cents, kiln count. A demurrer to this petition was sustained, and judgment having been rendered against the plaintiff, he brings the case to this court for revision.

Although the code of practice has abolished not only the pre-existing forms of action, but also the pre-existing forms of pleading, and has declared, that henceforth, the forms of pleading, and the rules by which their sufficiency is to be determined, are those prescribed in the code itself; it adopts what has always been a cardinal rule with respect to the allegations of the plaintiff, now called the petition, that it must contain a statement of the facts constituting the plaintiff's cause of action, with scarcely any other specific requisition, but that it be made in ordinary and concise language, without repetition. Title 7, chapter 1, section 144, p. 30, 31. But while the code contains a very few additional rules with respect to the mode or manner of alleging the facts relied on as constituting a cause of action, it does not, and could not, particularize the facts necessary to be stated, nor give any affirmative rule more special or more instructive than that which requires that the petition shall contain the facts con-

stituting the plaintiff's cause of action. The code makes no change in the law which determines what facts constitute a cause of action, except that by reducing all the forms of action to the single one by petition, it changes the question whether the plaintiff's statement of his cause shows facts constituting a cause of action in trespass, or *assumpsit,* or other particular form, into the more general question, whether it shows facts which constitute a cause of action at all, that is, whether the facts stated are sufficient to show a right in the plaintiff, an injury to that right by the defendant, and consequent damage. What facts do in this sense, constitute a cause of action, is determined by the general rules or principles of law respecting rights and wrongs, and by a long course of adjudication and practice, applying those rules to particular actions, under the long established rule of pleading, that the declaration must state the facts which constitute the plaintiff's cause of action. In adopting this fundamental rule of pleading, the code must be considered as adopting also the prevailing and authoritative exposition of it as understood at the time, except so far as the code itself, either expressly, or by necessary implication, requires facts to be stated which need not before have been stated, or dispenses with the statement of facts formerly deemed necessary.

The express dispensations apply rather to the form of statement than to the facts to be stated. They are to be found principally in chapter 7, of the title heretofore referred to, in sections 175, and 176, page 36: The implied dispensations grow mainly out of the reduction of all actions to one form. The requisition of additional facts may be implied from the abolition of that rule which had formerly made it sufficient, and indeed, proper, to state facts according to their legal effect, instead of stating them as they actually occurred, which the code seems to require by the rule that they shall be stated in ordinary language. The code does not authorize a recovery upon a statement of facts which did not constitute a cause of action in some form, before the code was adopted. And, therefore, the former precedents, and rules, and adjudications, may now be resorted to as authoritative, except so far as they relate to the distinctions between the different forms of actions, or to merely formal or technical allegations, and except so far as particular allegations formerly deemed substantial are dispensed with, or so far as

particular allegations may now be necessary where allegations, according to the legal effect of the facts, may formerly have been sufficient.

Under this view of the present law of pleading, we are of opinion, that the petition in this case is defective in not stating either in terms or in substance the contract for a breach of which the action is brought. It is not sufficient to state that on a named day the plaintiff and the defendants entered into a contract signed by them, which is herewith filed, made part hereof, marked A—that the plaintiff, in pursuance of the contract, did and performed certain acts, and that the defendants either did or failed to do certain acts on their part in violation of the agreement. The rule of the code before referred to, requires that the petition shall state the facts constituting the cause of action; and, although in another section, it also requires that where the action is founded on a writing, the writings shall be filed as a part of the petition, which, as we think, implies that it shall also be referred to in the petition, there is, in our opinion, no dispensation, either express or implied, with the necessity of stating in the petition so much of the contract as shows that the plaintiff, by reason of the alleged acts or omissions on his part, and of those on the part of the defendants, is entitled to an action and to relief. The petition must contain in its own body, and not merely by reference to another paper, a statement of the facts constituting the cause of action.

But if the petition in this case had set out the entire contract, it would still be defective, either in not stating that the one hundred and seventy thousand bricks, for which payment is demanded, were made and burnt at the Grayson Springs, at the place designated by the defendants, if they did designate any, or in not stating that the defendants had accepted the bricks actually made. We are inclined to the opinion that the election of the defendants not to build in the spring, 1850, was a dispensation with further performance by the plaintiff, which entitled him to be paid, according to the price stipulated in that event, for the bricks previously made, in pursuance of the contract. And even if this be not so, the plaintiff was entitled to be paid for his work and materials made and furnished for the use of the defendants, and under their employment, as much as

they were reasonably worth,[2] provided they were either accepted by the defendants, or were furnished at the place stipulated. But as the plaintiff has not averred, and could not have averred, that he had done all which was by the contract to be done on his part, he should have shown by positive statements of facts, that what he did do, was beneficial to the defendants in the manner contemplated by the contract, or that it was accepted by them. It is not sufficient to say, that in pursuance of the agreement, he made and burnt one hundred and seventy thousand bricks on the premises of the defendants.

Judgment affirmed.

CAPLES v. BRANHAM.

Supreme Court of Missouri, 1855. 20 Mo. 244.

Action by Caples and others against Branham on a subscription paper to recover $100. The paper was in these words:

"January 22d, 1853.

"We, the undersigned, agree to pay the amounts affixed to our respective names, to trustees to be appointed by the educational convention of the Methodist Episcopal church south, for the Western district, for the purpose of purchasing grounds and building houses suitable for one or more high schools, within the limits of Western district; the place or places and character of the house or houses to be determined by said convention or under their order by trustees or otherwise; one-half to be paid on the first day of June, 1853, and the balance on the first day of April, 1854."

This paper was subscribed by the defendant among others, and two hundred dollars written opposite his name.

This suit was brought September 19, 1853, to recover the first instalment of the amount subscribed by the defendant. The petition alleges that the defendant, by the above writing, promised to pay the sum of $200 "to the trustees to be appointed,"

2 See Eyerman v. Cemetery Asso'n, 61 Mo. 489, ante p. 44 * * *, that in an action on the contract a plaintiff who has not performed his part cannot recover the reasonable value of labor and materials, but must frame his complaint on a quantum meruit.

&c., setting forth the effect of the instrument, and avers that the plaintiffs are the trustees appointed by the educational convention. No consideration for the promise is alleged, other than is imported in the words of the instrument.

A demurrer was filed and the following causes assigned: 1. That there was a defect of parties—there being no promisees, either natural or civil persons. 2. That the petition stated no consideration for the promise.

The demurrer was overruled, and no answer being filed, a judgment was entered for the plaintiffs, from which the defendant appeals.

SCOTT, Judge.—1. Bills and negotiable promissory notes, by the common law, imported a consideration. Between the immediate parties to such instruments, the consideration might be enquired into as between the maker and promisee, and the drawer and the acceptor. All other contracts not under seal,[3] whether written or oral, required a consideration. In 1765, Mr. Justice Wilmot was strongly of the opinion, and Lord Mansfield apparently so, that a written promise not under seal, carrying with it the evidence of deliberation, required no consideration. Their opinion did not obtain. There is no difference at common law between an oral and written promise not under seal; they are both classed under the head of simple or parol contracts.

Our legislature, aware that men are not apt to promise to pay money without a sufficient inducement or consideration, and knowing that, in most instances, a consideration exists for promises, has changed the rule of the common law, and, at an early day, made all notes in writing executed and signed by any person or his agent, whereby he shall promise to pay to any other person, or his order, or unto bearer, any sum of money or property therein mentioned, import a consideration.

3 "It has been often said that a seal imports a consideration, as if a consideration were as essential in contracts by specialty as it is in the case of parol promises. But it is hardly necessary to point out the fallacy of this view. It is now generally agreed that the specialty obligation, like the Roman stipulatio, owes its validity to the mere fact of its formal execution."

Ames, Specialty Contracts and Equitable Defenses, 9 Harvard Law Rev. 49.

The code has not changed the rule that in actions on specialties no consideration need be alleged, Montgomery v. Auchley, 92 Mo. 126; Considine v. Gallagher, 31 Wash. 669, (1903).

The object of this provision was, to place notes not negotiable on the same footing occupied by negotiable notes, so far as the matter of a consideration was concerned. The writing showed deliberation, and, in the nature of things, there is no reason why the one instrument should not import a consideration as well as the other. We are aware that the credit of negotiable paper is sustained by considerations of commercial policy. The law provided for one class of promissory notes. The statute was designed to provide for all others. The instrument sued on is certainly a note in writing, signed by a party promising to pay money. There is no form prescribed by law to which we must adhere in the making of a promissory note; no formal words are required. If, in sense, it is a promise in writing to pay another money or property, it is a promissory note. A negotiable note, payable to a fictitious person, is a valid instrument, and may be declared on as one payable to bearer. * * *

In this state, ever since the statute of 1807, which allowed bonds and notes, when sued on, to be read in evidence, unless their execution was denied under oath, it has been held that promissory notes imported a consideration, and that, in an action on them, it was unnecessary to set out a consideration[4] in the declaration. (Rector & Conway v. Honore, 1 Mo. Rep. 204.)

Under the former system of pleading, there would be an objection to this action, on the ground that a part of a debt due by instalments, was sought to be recovered as a debt. The money here sued for is claimed as a debt. A debt is not divisible. Strictly, this action, in form, should have been for damages. The objection, however, would probably not be available under the present practice act, and this suggestion is made lest it should be thought that the court had impliedly overturned a principle which may have application on occasions not arising in pleading. The other judges concurring, the judgment will be affirmed.

[4] In the case of other simple contracts a failure to allege consideration is a fatal defect, not cured by verdict, Swift v. Fire Ins. Co., 279 Mo. 606, (1919).

JONES v. EWING.

Supreme Court of Minnesota, 1875. 22 Minn. 157.

Defendant mortgaged certain real estate to plaintiff. The mortgage contained the usual power of sale, and, upon default in payment, was foreclosed by advertisement, the plaintiff becoming the purchaser. After the expiration of the year of redemption plaintiff brought this action for unlawful detainer, under Gen. St. ch. 84, to recover possession of the premises so mortgaged and sold to him. The justice rendered judgment for plaintiff, from which defendant appealed. The appeal was heard in the district court for Hennepin county, Vanderburgh, J., presiding, and judgment rendered for defendant on the pleadings, from which the plaintiff appeals. The objection to the complaint is that in setting out plaintiff's title it fails to state that no action had been brought, before the foreclosure, to recover the mortgage debt, etc.

CORNELL, J. To entitle any party to give notice of the foreclosure of a real estate mortgage by advertisement, and to make such foreclosure, the statute declares that "it is requisite" among other things, "that no action or proceeding has been instituted at law to recover the debt then remaining secured by such mortgage, or any part thereof; or, if the action or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered therein has been returned unsatisfied, in whole or in part." Gen. St. ch. 81, § 2.

In setting up a title acquired under such foreclosure, is it necessary, in addition to the other essential facts showing a right to give the notice and make the foreclosure, that the pleading contain an averment that no action or proceeding has been instituted at law to recover the debt secured by the mortgage, or any part thereof; or, if instituted, that the same has been discontinued; or, that an execution, etc., has been returned, unsatisfied, in whole or in part? This is a question of pleading, and must be determined by the rules of pleading. If a complaint contain a distinct statement of all the facts which, upon a general denial, the plaintiff will be bound to prove, in the first instance, to protect himself from a nonsuit, and to show himself entitled to a judgment, it is good pleading. It is sufficient if

it shows a *prima facie* right in the plaintiff to recover, and it is not necessary that it should negative a possible defense (Moak's Van Santvoord, 163; Doughty v. Devlin, 1 E. D. Smith, 625, 631), or state matter which would come more properly from the other side. Stephen Pl. 350. These are general and elementary rules of pleading, applicable as well under the code as under the former practice. The only difficulty arises in their application to particular cases.

The right of foreclosure by advertisement rests upon the power of sale contained in the mortgage, the proper record thereof, and of its assignments, if any, and the further fact that such power has become operative by reason of some default. An action or proceeding instituted at law to recover the mortgage debt has the effect of suspending, for the time, the exercise of the right; but its non-existence[5] can hardly be said to give or create the right. The mortgagee or his assignee, in whom, at the time, is vested the power of sale, is the proper party, and the only one legally competent, to exercise the right by an execution of the power; and when nothing is suggested upon the record going to show its suspension by reason of a suit commenced, or the existence of some disability preventing the party from acting, it must be presumed that he acted rightfully. If any such fact is claimed to exist, it is a matter more properly coming from the other side, and should be set up in the answer.

Judgment reversed.

TOOKER v. ARNOUX.

Court of Appeals of New York, 1879. 76 N. Y. 397.

Appeal from judgment of the General Term of the Court of Common Pleas, in and for the city and county of New York,

[5] See also Stoebe v. Fehl, 22 Wis. 337, to the effect that in an action by the vendee of a life tenant, the death of the life tenant need not be negatived.

Compare action against a municipal corporation where a statute requires a notice of the claim to be given to the city, Winter v. Niagara Falls, 190 N. Y. 198, (1907).

affirming a judgment in favor of plaintiff, entered upon a verdict.

The facts alleged in the complaint were as follows:

"First.—That on or about the 25th day of July, 1872, at the city of New York, James Watson made and delivered to the plaintiff for value his certain draft or order, in the words and figures following:

"New York, July 25, 1872.

"William Henry Arnoux:

"Dear Sir—Please pay to William T. Tooker the sum of five hundred and fifty-six (556) dollars, out of the money to be realized from the sale of the houses on the north side of 46th street, City of New York, and known as Nos. 305, 307 and 309, East 46th street.

"James Watson."

"Second.—That thereafter, and on or about said day, the plaintiff presented said draft or order to said Arnoux, who thereupon for value duly accepted the same."

"Third.—That on the 6th day of August, 1872, said Arnoux paid on account thereof one hundred dollars, and there is now due on said draft or order, from the defendant, the sum of four hundred and fifty-six dollars, with interest from said 25th day of July, 1872."

And judgment was asked for that amount.

The answer admitted the acceptance of the order, the payment of $100, but denied that there was any money realized from the sale of the houses, or that there was due plaintiff the sum claimed.

At the beginning of the trial, defendant's counsel moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The motion was denied, and said counsel duly excepted. Plaintiff offered evidence of the sale of the houses specified in the order. This was objected to by defendant's counsel on the ground that this was not averred in the complaint. No application was made for an amendment of the complaint.

The court directed a verdict for plaintiff, which was rendered accordingly.

RAPALLO, J. At the opening of the trial the defendant moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The motion was denied

and exception taken. The reason assigned was that the defendant should have demurred.

This position is in conflict with section 148 of the Code and with many decisions of this court. If the complaint was bad in substance the objection was available on the trial and the motion to dismiss should have been granted. (Schofield v. Whitelegge, 49 N. Y. 259; Coffin v. Reynolds, 37 id. 640; Emery v. Pease, 20 id. 62.)

We think the complaint was clearly bad. The sale of the houses mentioned in the order and the receipt of money from such sale were conditions precedent[6] to the defendant's liability on his acceptance, and those facts should have been averred.[7] In the absence of such averments no indebtedness on his part to the plaintiff appeared. (Munger v. Shannon, 61 N. Y. 251, 260.)

The denial in the answer of the receipt of any such moneys did not supplement the complaint in this respect. In Bate v. Graham (11 N. Y. 237) the answer contained an affirmative allegation of the fact which the complaint should have averred, but in Schofield v. Whitelegge, as in the present case the answer contained a denial of the essential fact, and it was held that such denial did not cure the defect in the complaint.

The complaint in the present case cannot be sustained by virtue of section 162 of the Code, which provided that in an action

[6] Start, C. J., in Root v. Childs, 68 Minn. 142, (1897): * * * "Where the obligation of a party to a contract is to pay only upon the happening of a contingency, e. g. the return of an instrument duly recorded, such contingency is in the nature of a condition precedent, and its occurrence must be alleged in the complaint. Wilson v. Clarke, 20 Minn. 318 (367). But, if payment is not to be made if a contingency happens during its continuance, e. g. if the party is enjoined from using the acticle which is the subject matter of the contract, he is not to pay the purchase price until the injunction is dissolved, the contingency is in the nature of a condition subsequent, and it is not necessary to allege in the complaint the nonhappening or noncontinuance of the contingency. 1 Chit. Pl. 320." * * *

[7] "In pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance; but the party may state, generally, that he, or the person whom he represents, duly performed all the conditions on his part. If that allegation is controverted, he must, on the trial, establish performance." N. Y. Code Civ. Proc. § 533.

upon an instrument for the payment of money only, it should be sufficient to set forth a copy of the instrument and allege the amount due thereon. It was decided by this court in Conkling v. Gandall (1 Keyes 231), that section 162 was not applicable where the liability of the defendant was conditional, and depended upon facts outside of the instrument; that in such a case the facts must be averred.

The objection to the complaint was not waived upon the trial. The defendant not only took the objection of the insufficiency of the complaint before any evidence was taken, but when the plaintiff offered evidence of the fact that the houses had been sold, he objected to such evidence on the ground that the fact had not been alleged in pleading.

We see no ground upon which this case can be distinguished from the numerous cases in which it has been decided that a party may upon the trial lawfully demand a dismissal of the complaint on the ground that it does not state facts sufficient to constitute a cause of action.

The court below at General Term conceded that if the trial judge had granted the motion to dismiss it would have been bound to sustain his action. The necessary consequence of this concession is that in denying the motion the trial judge erred. It was not a question of discretion, but of legal right, whether the complaint should be dismissed, and if it would not have been error to grant the motion, it was error to deny it. It is true that an amendment of the complaint might have been allowed in the court below, but no amendment was made or asked for, and the objection to the complaint having been taken in due season and overruled, the correctness of the ruling must be tested by the complaint as it stood, and not as it might have been changed by amendment.

The judgment must be reversed and a new trial ordered, costs to abide the event.

JOHNSON v. NORTHWESTERN INSURANCE CO.

Supreme Court of Wisconsin, 1896. 94 Wis. 117.

Action on an insurance policy for $800.00 on a horse. A demurrer *ore tenus* to the complaint was overruled, and the trial resulted in a verdict for the plaintiff, from which defendant appealed.[8]

NEWMAN, J.: At the commencement of the trial there was a demurrer *ore tenus* to the complaint, on the ground that it did not state a cause of action. The policy contained an agreement that the insured would "use due diligence, precaution, and care in the use, and for the safety, health, and preservation, of said live stock, and in case of sickness or accident would promptly summon to his aid the best veterinary surgeon to be had in the vicinity." A failure to do so was to avoid the policy. The demurrer was based principally upon the failure of the complaint to allege affirmatively the performance of this agreement. This was not a defect in the complaint. The performance of this agreement was a condition subsequent. It did not go to the original validity of the policy, but was a stipulation to be performed afterwards. Its breach is a defense merely. It is no necessary part of the plaintiff's case, in the first instance, either by pleading or proof, to show that he has performed it. If the defendant relied upon failure to perform this stipulation of the policy, it should be set up as a defense. It could make it available in no other way. Redman v. Insurance Co., 49 Wis. 431 (4 N. W. 591); Schobacher v. Insurance Co., 59 Wis. 86, (17 N. W. 969); Benedix v. Insurance Co., 78 Wis. 77 (47 N. W. 176). * * *

Judgment reversed.[9]

[8] Statement condensed and part of the opinion omitted.

[9] The judgment was reversed for error in the instructions.

JONES v. ACCIDENT ASSOCIATION.

Supreme Court of Iowa, 1894. 92 Iowa 652.

KINNE, J. 1. April 8, 1891, the defendant company issued its policy of insurance upon the life of one W. M. Jones, in the sum of $5,000, against "personal bodily injuries, effected during the continuance of membership and this insurance, through external, violent and accidental means." Among the conditions of the said policy were the following: "The insurance under this contract shall not extend to or cover * * * accidental injuries or death resulting from or caused, directly or indirectly, wholly or in part, by * * * fighting; * * * or voluntary exposure to unnecessary danger; nor extend to or cover accidental injuries or death happening while the insured is under the influence of intoxicating drinks, or in consequence thereof; or while or in consequence of violating the law." And also: "The provisions and conditions aforesaid, and a strict compliance therewith during the continuance of this contract, are conditions precedent to the issuance hereof, and to its validity and enforcement." The application upon which the policy was based contained the following statement: "(3) My habits of life are correct and temperate, and I agree that the certificate of membership shall not cover any injury which may happen to me while under the influence of intoxicating drinks or narcotics, or in consequence of having been under the influence thereof." The policy was made payable to plaintiff. The petition charges "that on or about the 31st day of May, 1892, at Council Bluffs, Iowa, and whilst the said policy of insurance was in full force and effect, and without any fault or negligence on the part of the assured, he, the said W. M. Jones, was mortally wounded by a pistol ball fired by one John Wade, and that he died as a result thereof." It is also averred that proper proofs of death were sent to and received by the company in due time. * * *

At the close of the testimony, defendant filed a motion in arrest of judgment, claiming that the petition did not state a cause of action, in that it failed to aver that none of the conditions upon which the policy was issued were "breached" by the assured. This motion was overruled and an exception taken. Defendant's contention is that it was only to be liable in the case

of death of the assured in the absence of certain conditions stated in the policy, and that it was incumbent upon the plaintiff to negative these exceptions in his petition. The question then is, must these conditions or exceptions, the existence of which may relieve the defendant from liability, be pleaded by plaintiff, or are they so far matters of defense as that the burden is upon the defendant to plead and prove them? In our judgment, they were not required to be pleaded or proven by plaintiff. They were purely matters to be relied upon in defense of an action on the policy. Defendant insured Jones, "subject to the by-laws and all the conditions indorsed hereon (on the policy) against personal bodily injuries effected during the continuance of membership and this insurance, through external, violent, and accidental means." On this policy it is said: "The conditions under which this certificate was issued and accepted by the assured are as follows: Then follow the several provisions that the contract shall not extend to or cover certain cases, theretofore mentioned. At the end of these conditions it is said "The provisions and conditions aforesaid, and a strict compliance therewith during the continuance of this contract, are conditions precedent to the issuance hereof, and its validity and enforcement." It ought to be said that the fact that the contract says that certain provisions of it shall be conditions precedent does not, of necessity, make them such. We cannot accede to the doctrine that the provisions under consideration are conditions precedent. A condition precedent, as applied to the contract, is a condition which must be performed before the agreement of the parties becomes a valid contract. Redman v. Insurance Company, 4 N. W. 595, 49 Wis. 431. The conditions in this case were that the contract should not cover accidental death resulting from or caused by fighting, voluntary exposure to unnecessary danger, intoxication, or to death in consequence thereof, and in consequence of violating the law. Not one of these conditions were to happen prior to the time the contract between the assured and the company should become binding. The contract became binding upon the company as soon as it accepted the assured as a member, and issued to him its policy. The situation then is this: That there was a valid contract of insurance when the policy issued, but it might thereafter, upon the happening of some of these conditions, cease to be enforceable. If, then, these provisions of the policy can be properly

called conditions, they are in no sense conditions precedent. Under them the defendant might be relieved from liability. They were each and all matters of defense, available to the defendant; but, not constituting a part of the plaintiff's case, the burden did not rest upon him to either plead or prove them in the first instance. Redman v. Insurance Co., *supra;* Coburn v. Insurance Co., 145 Mass. 226, 13 N. E. 604; Freeman v. Insurance Co., 144 Mass. 572, 12 N. E. 372; Insurance Co. v. Nichols (Tex. Civ. App.), 24 S. W. 910; Badenfeld v. Association (Mass.), 27 N. E. 770; Insurance Co. v. Ewing, 92 U. S. 377; Cronkhite v. Insurance Co. (Wis.), 43 N. W. 731; Newman v. Association, 76 Iowa 63, 40 N. W. 87; Sutherland v. Insurance Co. (Iowa), 54 N. W. 453. The motion in arrest was properly overruled.[10] * * *

Judgment reversed.[1]

LENT v. N. Y. & M. R. R. CO.

Court of Appeals of New York, 1892. 130 N. Y. 504.

Action to recover the amount awarded to plaintiff in condemnation proceedings. The complaint alleges the various proceedings resulting in the award, but did not allege non-payment.[2]

BROWN, J. * * * It remains to consider the question whether, giving to the word "entered" the interpretation that we have, the complaint states a cause of action. The effect of the recording of the order was to create a debt against the defendant, and in that respect its liability is analogous to a liability arising upon the maturity of a contract for the payment of money, and the question is presented whether an allegation of non-payment is essential and material to the cause of action. The code (section 481), provides that the complaint must contain a plain and concise statement of the facts constituting the cause of action, and the general rule deduced therefrom is that whatever facts are essential to be proven to entitle the plaintiff

[10] For a collection of the cases, see Red Men's Fraternal Accident Ass'n v. Rippy, 50 L. R. A. (N. S.) 1006, (1913), annotated.

[1] The judgment was reversed for errors in the course of the trial.

[2] Statement condensed and part of the opinion omitted.

to recover upon the trial must be alleged in the complaint. It does not admit of controversy that, upon an ordinary contract for the payment of money, non-payment is a fact which constitutes the breach of the contract, and is the essence of the cause of action, and, being such, within the rule of the code it should be alleged in the complaint. It is said, however, that payment is always an affirmative defense, which must be pleaded to be available, and hence non-payment need not be alleged, as it is not a fact put in issue by a general denial. Salisbury v. Stinson, 10 Hun 242. The rule that payment is an affirmative defense is not one embodied in the code, but had its origin under the common law practice in the plea of non-assumpsit; and the reason for it was that in assumpsit the allegation in the declaration and the traverse in the plea were in the past tense, and, under the rule which excluded all proof not strictly within the issue, no evidence was admissible, except such as had a tendency to show that the defendant never had made the promise. It was never applied in the action of debt,[3] the allegation in that form of action being in the present tense, and, under the plea of *nil debet*, any fact tending to show that there was no indebtedness on the part of the defendant was admissible. The history of the rule is set forth in Judge Seldon's opinion in McKyring v. Bull, 16 N. Y. 297, and need not be referred to here. Following the rule thus established under the former practice, the courts have uniformly held, since the adoption of the code, that payment must be pleaded, and cannot be proven under the general issue. While the effect of these decisions is to modify somewhat the rule embodied in section 500 of the code, their tendency is to simplify pleading, as under their application the plaintiff is informed of the precise defense intended to be made, and thus unnecessary preparation is obviated, and surprise on the trial avoided.

But there is no need to further extend the rule, and hold that, because payment as a defense must be pleaded, the breach of the agreement need not be alleged in the complaint. That would have the contrary effect, and lead to embarrassments that are avoided when the plain provisions of the code are followed. No authority exists, so far as I am able to find, except the case of Salisbury v. Stinson, holding that a breach of the contract need

3 See note to McKyring v. Bull, post, p. —.

not be pleaded, but all text writers and reported cases hold to the contrary. 1 Chitty Pl. & Pr., pp. 325-359; Com. Dig. tit. "Pleader," C, 44; 2 Wait, Law & Pr. p. 318; 1 Wait. Act. & Def. pp. 394, 395, and cases cited; Witherhead v. Allen, 4 Abb. Dec. 628; Tracy v. Tracy (Sup.), 12 N. Y. Supp. 665; Van Gieson v. Van Gieson, 10 N. Y. 316; Krower v. Reynolds, 99 N. Y. 245, 1 N. E. 775. Witherhead v. Allen arose upon a demurrer to a complaint. The opinion states the rule as follows: "When the action is founded upon the contract obligation or duty of the defendant, the very gist and essence of the cause of action is the breach thereof by the defendant, and, unless a breach is alleged, no cause of action is shown." In Van Gieson v. Van Gieson, 10 N. Y. 316, it is said: "The material allegations of the complaint in this case are the making by the defendants of the promissory note, the transfer of it to the plaintiff, and the non-payment by the defendants. Each of them is material, for without the concurrence of all of them the complaint would not show a cause of action." To the same effect is Keteltas v. Myers, 19 N. Y. 231. See, also, Code § 534, 1213, subd. 2. In Krower v. Reynolds it was held, in an action on a covenant to pay a mortgage, that it was necessary to allege that the mortgage had not been paid, or that the defendant had failed to perform his covenant, and without such allegation the complaint was demurrable. And in numerous cases, which need not be cited, but of which Allen v. Patterson, 7 N. Y. 476, is a type, the rule is recognized by implication, but the complaints were held good because of an allegation of indebtedness by the defendant to the plaintiff. This rule is further recognized in section 534 of the code, which provides a simple form of pleading on an instrument for the payment of money only, but requires the plaintiff to state the sum which he claims to be due to him thereon. Again, the complaint, when verified, and there is no answer, stands as proof of the plaintiff's claim, and the clerk is authorized to enter judgment thereon.

But if the plaintiff is not required to allege a breach of the contract or state the amount due, as his verification would cover only the facts alleged, the clerk, under sections 420, 1212, 1213, of the code, would be authorized to enter judgment for the whole amount called for by the contract, and this without proof of the amount due thereon. This would be contrary to the whole spirit of the code, and would require the clerk to presume a fact

neither alleged nor proved, viz., that no payments had been made. These views show how essential to the practice it is that the plaintiff should allege the breach of the contract of which he complains. That breach is always a fact, and it is of the very essence of the cause of action. The complaint should show facts which, if verified and not denied, prove to the clerk that the plaintiff is entitled to the judgment which he demands. It cannot be said that where the breach consists in non-payment of an agreed sum, it is not an issuable fact, because payment cannot be proven under general denial. The most that can be said is that that form of denial does not put that fact in issue, and to that extent the rule that payment must be pleaded must be deemed to modify the rule of pleading under the code in reference to a general denial. But no reason is apparent how it can justify the omission from the complaint of a fact material to the plaintiff's cause of action, and essential to be proved to entitle the plaintiff to a judgment. Such facts, under the code, must be pleaded. No presumption can be indulged in that a defendant has failed in his duty or omitted to perform his contract obligation. There was no allegation in the complaint in this action that the defendant had failed or omitted to pay the award, and no allegation of indebtedness, and without such no cause of action was stated.[4] On this ground we are of the opinion that the demurrer was well taken. Other objections to the complaint were discussed upon the argument, but none of them are considered well taken. The judgment must be reversed, and the demurrer sustained, with costs, with leave to the plaintiffs to amend the complaint within thirty days on payment of costs. All concur, except Follett, C. J., and Vann, J., dissenting, and Potter, J., not voting.

WIEDE v. PORTER.

Supreme Court of Minnesota, 1876. 22 Minn. 429.

The complaint alleged the sale of certain horses by defendant to plaintiff's assignor, with a warranty of soundness, etc. The answer was a general denial.

[4] Rosseter v. Schultz, 62 Wis. 655, (1885), contra.

At the trial, the court excluded all evidence to prove that the contract was made by defendant's authorized agent, and directed a verdict for defendant. The plaintiff appealed.[5]

CORNELL, J. This case comes before us upon exceptions to the ruling of the court upon the admissibility of certain testimony offered under the issues made by the pleadings. The real question presented is whether, upon an issue raised by a denial of the execution of a contract of sale and warranty, alleged to have been made between defendant and one Shaeffer, it was competent to prove that such contract was made by the duly authorized agent of Shaeffer; in other words, when the contract of the principal, which constitutes the foundation of the cause of action, is made through the intervention of an agent, is it necessary, in pleading it, to aver that fact and the authority of the agent?

Issuable facts alone are required to be stated in a pleading, and those according to their logical and legal effect. In this case the fact traversed by the answer, the proof of which would support the action, was the execution of the particular contract. If it was entered into by the party, its effect was the same, whether done by the principal personally or by his authorized agent. In either case it was the contract of the principal. The complaint was sufficient to allow the evidence offered, tending to show that the alleged contract was, in fact, the contract of Shaeffer and the exclusion of such evidence was error, for which a new trial must be granted.[6]

Judgment reversed.

PIER v. HEINRICHOFFEN.

Supreme Court of Missouri, 1873. 52 Mo. 333.

EWING, Judge, delivered the opinion of the court.

This is an action on a promissory note by the plaintiffs as indorsees against the defendants as indorsers, payable at the office

5 Statement condensed.

6 And so in Slevin v. Reppy, 46 Mo. 606, (1870).

of Williams, in St. Paul, Minnesota; the note bears date, St. Louis, October 12, 1860, and is payable on the first day of July thereafter (1861). The petition contains the usual averments of presentment and demand of payment at the maturity of said note, refusal to pay, protest of the same, and that defendants were duly notified thereof. The answer of defendants is a denial of the allegations of the petition. Plaintiffs made application for a continuance of the cause, on the ground of the absence of witnesses, who resided at St. Paul, by whom they expected to prove facts excusing the delay in making the demand of payment, and in giving notice to the defendants. The motion for a continuance being overruled, and the cause being submitted to the court,—jury waived,—the plaintiffs read the note in evidence, and then offered to show by the certificate of protest of one Malmros, a notary public, and his depositions accompanying the same, that said note was presented for payment at the place where the same was made payable, that it was protested, and notice given the defendants on the 15th day of July, 1861. This evidence was excluded on the objection of defendants, whereupon plaintiffs took a non-suit with leave, etc. The motion to set aside the nonsuit being overruled, the cause is brought to this court by appeal. * * *

The order in which evidence may be introduced is a matter very much in the discretion of the court, and this discretion may be properly exercised by inverting the regular order, and admitting evidence that presupposes facts, which logically and naturally precede it, but when such evidence is offered abstractly without an offer to sustain it by proof of such antecedent or primary facts, and without which it would be wholly unavailing, and no intimation of such a purpose is given to the court, we cannot say that the court erred in excluding it.

This evidence, however, was rightly excluded on more substantial grounds. The petition avers that demand of payment was made *at the maturity* of the note, and that defendant was duly notified thereof. This allegation was put in issue by the answer. Neither the evidence offered nor that of the absent witness, as disclosed by the affidavit for a continuance, tended to prove this averment, but on the contrary to *disprove* it by showing an *excuse* for not making the demand at the time alleged in the petition.

It may be conceded, that at common law this petition would

be sufficient; that the averments would be sustained by proof of any state of facts showing an excuse[7] according to the custom of merchants, by proof of facts which dispense with actual demand and show due diligence, without stating them specifically in the pleading.

Is this good pleading however under our code? For not only the forms of pleading, but the rules by which the sufficiency of pleadings, except where otherwise specially provided, are to be determined and prescribed by our Practice Act. (2 W. S. § 1, p. 1012.)

As the vice of the old system of pleadings was its prolixity, its general averments, and general issues, and the delay and expense inseparable from it, the new system (or the modifications of the old) which we have adopted has little claim to be considered a *reform,* unless it avoids such defects and furnishes rules, by which the great object of all pleadings is better attained, namely, to arrive at a material, certain and single issue. Hence, the great improvement of our code consists in requiring the pleadings to contain a plain and concise statement of the *facts, constituting* a cause of action, or matter of defense. (2 W. S. 1013, § 3; and 1015, § 3.) Facts, and not evidence, nor conclusions of law, must be distinctly stated. Every fact, which the plaintiff must prove to maintain his suit, is *constitutive* in the sense of the code, and must be alleged. Facts, which dispense with the necessity of making demand of payment and giving notice to the indorser, are as essential to the plaintiff's right of recovery, as the fact that the defendant indorsed the note, or that it was executed and delivered by the maker, or that plaintiff is the holder. And the defendant has the right to controvert the one or the other in his answer. He should therefore be informed by proper averments in the petition, what facts are relied on to charge him, so that he may have an opportunity to controvert them. Such an allegation of demand of payment at *maturity,* and due *notice* thereof to the indorser, could give no intimation to the defendant of the nature of the evidence, by which the plaintiff proposed to sustain it. He could only know, that he received no notice; but of what steps if any were taken to give

[7] But see Burgh v. Legge, 5 M. & W. 418, (1839). For the view that an allegation of demand and notice is supported by proof of waiver or other excuse, see Harrison v. Bailey, 99 Mass. 620.

it, or of the causes of the failure to give it, or of the facts relied on to excuse the want of it he of course is presumed to have no knowledge. These are matters within the knowledge peculiarly of the plaintiff, which he should allege in his pleading, and prove. He alleges *facts* the legal *effect* of which if true could charge the defendant; but he claims, that he should be allowed to sustain this allegation by facts of a totally different character, not alleged in his petition, because the same legal consequence would follow.[8]

In Garvey v. Fowler, 4 Sandf. 665, it was held, that where in an action on a check, facts are relied on which excuse notice of presentment and non-payment, as that the drawer had no funds in the bank the day the check was presented, they must be stated in the complaint. And that an averment of due notice will not be sustained by evidence of facts excusing notice.

To the same effect is Schultz v. Dupuy, 3 Abb. Pr. 252.

The question has been decided the same way in Iowa, Lambert & Co. v. Palmer, *et al.*, 29 Iowa 104, the court holding that under an averment like that in the case at bar, there could be no recovery upon proof of facts amounting to a waiver of demand and notice, as a subsequent promise to pay by the drawer or indorser after full knowledge of the facts. See, also, Cole v. Wintercost, 12 Tex. 118.

It is scarcely necessary to add, that the codes of New York, Iowa and Texas, in respect to the rules of pleading, are substantially the same as our own.

Judgment affirmed.

[8] And so in Thompson v. St. Charles, 227 Mo. 220, (1919) that in an action on a building contract an allegation of performance was not supported by proof of a waiver by defendant, distinguishing certain insurance cases in which the contrary rule is frequently applied: "In the law of contracts insurance policies are a class unto themselves. They are prepared by the wary, accepted by the unwary. The principles of insurance are abstruse and highly technical in many phases, understood by those who tender the policies, not by those who accept them. The plain indemnity features of policies are not infrequently compassed about with rows of impaling provisions, exceptions, provisos and forfeitures intended to defeat liability."

WOODRUFF v. WENTWORTH.

Supreme Judicial Court of Massachusetts, 1882. 133 Mass. 309.

FIELD, J.[9]—The instruction to the jury, "that if any consideration other than the one declared upon is shown to have been actually paid or received, this is not a variance which prevents the plaintiff's recovery, but the action may still be maintained," was erroneous. The consideration must be proved as alleged. Stone v. White, 8 Gray 589.

The declaration[10] alleged that the defendant's promise was "in consideration that the plaintiff would assent to the election of William H. Pray as manager of the American Carpet Lining Company, in the defendant's place," etc. There was evidence that the consideration of the defendant's promise was that the plaintiff would vote for the election of Pray as the manager, and also would vote to increase the salaries of the president, treasurer, clerk and manager. If this was the contract between the parties, the defendant would not be liable unless the plaintiff proved that he had done both these things. The declaration does not describe any such contract, and it does not correctly allege either the whole consideration proved or any part of it.

The necessity of proving the consideration of the promise of the defendant, as laid in the declaration, must be distinguished from the necessity of alleging everything that is promised by the defendant. Brackett v. Evans, 1 Cush. 79. Neither can an amendment to the declaration after verdict be permitted in this case, as was done in Cleaves v. Lord, 3 Gray 66, in Stone v. White, *ubi supra,* and in many other cases. * * *

Exception sustained.

9 Statement and part of the opinion omitted.

10 The simplified pleading under the Massachusetts Practice Act is in this respect substantially the same as that of the regular Code states. Ed.

GRIFFIN v. BASS FOUNDRY COMPANY.

Supreme Court of Alabama, 1902. 135 Ala. 490.

This was a suit brought by the appellant, W. H. Griffin, against the appellee, the Bass Foundry & Machine Company, to recover as damages the reasonable profits which plaintiff would have made under a contract with the defendant, if the defendant had complied with its said contract. The facts of the case necessary to an understanding of the decision on the present appeal, are sufficiently stated in the opinion.

There were verdict and judgment for the defendant. From this judgment the plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

TYSON, J.—This is an action for damages for an alleged breach of a contract.

The complaint[1] avers that the defendant agreed to pay for the cutting of wood and the royalty on the same, and that the breach consisted in its failure to do so. The negotiations between the parties resulting in a final agreement between them is shown by several writings. A number of letters and the original draft of the contract embody the terms and stipulations finally agreed upon. These several writings must, therefore, be looked to for the purpose of ascertaining what were the terms of the contract.

It is true that defendant agreed to advance to the plaintiff money to pay for the cutting of wood and the royalty on same. But its promise to advance the money to pay the royalty, if not for the cutting of the wood, was upon condition that a timber deed be made to it covering the right of possession and right of way. The obligation of defendant to pay being conditional and not absolute, the condition and its performance should have been averred in the complaint.—Griel v. Solomon, 82 Ala. 85. This not being done, there is clearly a variance[2] between the

1 The simplified pleading under the Alabama statute appears to be substantially the same as that under the regular codes.

2 In Walrath v. Hanover Fire Ins. Co., 216 N. Y. 220 (1915), where the complaint alleged the execution and delivery of a policy, and the proof showed an oral contract to issue a policy, the court announced the following rule as to variance:

contract counted upon and the one proven. Besides, the condition having been shown and no performance of it proven, no breach of the contract as alleged is shown.

The affirmative charge, if requested, could well have been given for the defendant. This being true, whatever of errors may have been committed in the giving or refusing of charges is without injury. The Bienville Water Co. v. City of Mobile, 125 Ala. 178.

Judgment affirmed.

WILKINS v. STIDGER.

Supreme Court of California, 1863. 22 Cal. 232.

CROCKER, J. This action was commenced by one McDaniel against the defendant to recover a demand for services as a surgeon and physician. The complaint avers that the plaintiff,

"It is fundamental that in civil actions the plaintiff must recover upon the facts stated in his complaint, or not at all. In case a complaint proceeds on a definite, clear and certain theory, it will not support or permit of another theory because it contains isolated or subsidiary statements consistent therewith. A party must recover not only according to his proofs but according to his pleadings. (Northam v. Dutchess Co. Mut. Ins. Co., 177 N. Y. 73; Canton Brock Co. v. Howlett, 169 N. Y. 293; Brightson v. Claflin Co., 180 N. Y. 76; Southwick v. First Nat. Bank of Memphis, 84 N. Y. 420).

At the close of the entire evidence the court permitted the plaintiff, under the proper objection and exception of the defendant, to insert in the complaint, as an amendment, allegations to the effect that the defendant agreed to deliver the policy of insurance and had failed and neglected to perform that agreement. The defendant, as we have stated, objected throughout the trial to the admissibility of the evidence in proof that the defendant made a parol agreement to insure the plaintiff and violated it. The complaint could be amended only at a time which would give the defendant a right and opportunity to meet by proof the allegations made against it. Romeyn v. Sickles, 108 N. Y. 650; Lamphere v. Lang, 213 N. Y. 585; Audley v. Townsend, 126 App. Div. 431). Moreover, it was error to permit at the trial an amendment which changed substantially the claim made in the complaint. (Dexter v. Ivins, 133 N. Y. 551; Spies v. Lockwood, 40 App. Div. 296; Code of Civil Procedure, § 723)."

McDaniel, is a physician and surgeon, and was employed by the defendant to perform services for him as such, which he did at the special instances and request of the defendant, and the nature of the services performed are then described; that for such services defendants is justly indebted to him in the sum of $2,855 over and above all payments; that the plaintiff has demanded payment from the defendant, but he has refused to pay the same. The complaint also avers, that defendant is indebted upon a promissory note, which is set out. When the case was called for trial, on motion of the counsel for the plaintiff, the name of Wilkins, the assignee of McDaniel, was substituted as plaintiff. The plaintiff recovered judgment; defendant moved for a new trial, which was denied, and he appeals.

The first error assigned is that the complaint does not state facts sufficient to constitute a cause of action, because that portion of the complaint which sets forth the claim for professional services does not aver any promise to pay, or that the services were of any value. We think the complaint in this respect sufficient. It follows substantially the form of a count in debt, under the old system of pleadings. By transposing the averments, it can then be read in this way: that the defendant was at a certain time indebted to the plaintiff, in a certain sum for professional services rendered by the plaintiff at the special instance and request of the defendant. The promise to pay, alleged in the common counts in assumpsit, was a mere conclusion of law from the facts stated, and as the new code only requires the facts to be stated, they are sufficient without setting forth the conclusions of law arising from those facts.[3] But, even if the complaint was in this respect defective, it is too late to make the objection after verdict. It should be made by demurrer.

[3] Accord: Farron v. Sherwood, 17 N. Y. 227 ante, p. 41. Higgins v. Germaine, 1 Mont. 230. But see Railroad Co. v. Kimmel, 58 Mo. 83, in which the petition alleged that the defendant was plaintiff's treasurer, etc., and that "He, as treasurer of plaintiff, on final settlement, on to-wit, the 5th day of July, 1872, was indebted to plaintiff in the sum of $298.42, balance on his settlement as treasurer." And the court said: "The petition in this case is defective in its omission to state the defendants' promise, which, though implied in law, must be pleaded as a fact."

Osgood v. Davis, 5 Cal. 453; Suter v. Cox, id. 415; Garcia v. Satrustegui, 4 id. 244. * * *

Judgment reversed.[4]

BOWEN v. EMERSON.

Supreme Court of Oregon, 1869. 3 Ore. 452.

UPTON, J. The objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by failing to demur. (Code, sec. 70.)

The complaint states that "on or about the eighteenth day of February, 1868, plaintiffs sold and delivered to the defendant 4,000 pounds of flour, and that the same was worth $212." It does not show that the defendant undertook or became obligated to pay for the flour within a designated time, or within a reasonable time, or when requested; nor that the time of payment had arrived before the commencement of the action. For aught that appears from the facts stated, the property may have been sold on credit, the time of which has not yet expired; or it may have been sold and delivered to the defendant upon the request and credit of another, with a full understanding that defendant was not to pay for it. It is assumed in argument that complaints like the one under consideration are sustained, by adjudications in other states, under codes similar to ours, and particular reference is made to the state of New York. A careful examination of the cases cited in support of this proposition will show that it is not correct. The decisions in some of the cases are based on special statutory provisions not contained in our code. For an instance the code of New York, section 162, provides, that "in an action or defense founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due him thereon from the adverse party a specified sum, which he claims." Precedents are found following this statute which do not state facts only, but which state conclusions. The same is true of other special provisions of statute. Cases predicated

[4] The judgment was reversed for error in the admission of evidence.

upon special provisions not contained in our code furnish but little assistance in this investigation. Fortunately, our code contains but few special provisions on the subject of pleadings that amount to a departure from the general rule, that the complaint shall contain a plain and concise statement of the facts constituting the cause of action. Attempts to simplify by making special provision for particular cases or classes of cases tend to complicate the system and to confuse, rather than simplify, the practice. They are generally a means of annoyance to the practitioner, and of delay and expense to parties. Every experienced pleader knows that there is nothing more difficult to the young practitioner, or that taxes more the memory of those who have experience, than to be compelled to conform to special statutes in pleading. Some of the cases cited purport to be based upon the general rule. The most prominent among them is that of Allen v. Patterson, 7 N. Y. 476. The opinion in that case, it must be conceded, is quite out of the general current of authority, and it is difficult to reconcile it with the numerous decisions in the same state that announce and reiterate the rule that the code requires facts to be stated, and not the conclusions that result from the facts. The opinion assumes, without argument and without citing any authority relating to the construction of any modern code, that the statement that the defendant is indebed to the plaintiff in a certain sum is the statement of a fact, and with equal brevity it reverses the long settled rule that "if the meaning of the words be equivocal, they shall be construed most strongly against the party pleading them." The statement that the defendant is indebted to the plaintiff is substantially the conclusion to be found by the jury at the end of the investigation. (Lienan v. Lincoln, 2 Duer 670; Drake v. Cockraft, 4 E. D. Smith 34; Seely v. Engell, 17 Barb. 530; Levy v. Bend, 1 E. D. Smith 169.)

It is not necessary in this case to determine to what extent the case of Allen v. Patterson should be considered law, because the complaint in this case does not show, by stating either facts or conclusions, that the defendant is indebted. The case of Farron v. Sherwood, 3 Smith 229, states the following rule, which seems entirely consistent with the enactments of the code: "It was not necessary to state in terms a promise to pay; it was sufficient to state facts showing the duty from which the law implies a promise." A fault with the complaint in this case is,

that it neither states a promise to do any certain act at any specified time, nor states facts from which a duty to so necessarily arises, or from which a promise is necessarily inferred. It is not probable that any method of pleading, in actions for money due upon contract, will ever be discovered, that is more simple and easy in practice, or better calculated to apprise the court and the parties of the ground and nature of the action, or more likely to leave a clear and concise record of what has been done than that which is now prescribed in the code. Notwithstanding this conceded truth, we sometimes meet with pleadings in this class of actions that neither conform to the common law nor to the requirements of the code. In actions for money due on contract, the common law required a concise statement of the facts, and in some particulars the employment of technical language; the code requires a *plain* and concise statement of the facts. In other words, the common law required the facts to be stated concisely, and sometimes in technical language; the code requires the facts to be stated concisely, and in plain or ordinary language. In this class of actions the pleader is required to state the facts that show that a contract existed between the parties, and that it has been broken, and in what particular, and the amount of damages the breach has caused. Facts only must be stated, as contradistinguished from the law, from argument, from conclusions, and from the evidence required to prove the facts. (Coryell v. Cain, 16 Cal. 571.)

The complaint does not in this case state facts sufficient to constitute a cause of action.

Judgment reversed.

GRANNIS v. HOOKER.

Supreme Court of Wisconsin, 1871. 29 Wis. 65.

Action to recover money received by the defendant to plaintiff's use.

The complaint alleges, in general terms, the receipt of $535, by the defendant to the plaintiff's use, demand of payment, and a refusal to pay over the same, or any part thereof.

The answer is a general denial.

In his opening at the trial, the plaintiff's attorney stated the facts which he expected to prove, showing that the plaintiff was induced to pay over to the defendant the money sued for, by means of certain false and fraudulent representations made to him by the latter, relative to the purchase of oil lands for a company of which he was a member.

The defendant objected to the admission of any evidence under the complaint, on the ground that it does not state facts sufficient to constitute the cause of action stated by the plainiff's counsel in the opening.

The objection was sustained, and judgment of non-suit entered; from which the plaintiff appeals.

Cole, J. The question arising in this case is really whether the complaint states a cause of action. The complaint contains what, under the former system of pleading, would be called a count for money had and received. On the trial, the attorney of the plaintiff made a statement of facts to the court and jury out of which the action arose, and then proceeded to support the issue on the part of the plaintiff by calling and having sworn a witness. Whereupon the defendant objected to any evidence being given under the complaint, on the grounds that it did not state facts sufficient to constitute a cause of action. This objection was sustained. The case therefore stands in the same attitude that it would on a general demurrer to the complaint.

We are inclined to hold the complaint sufficient on demurrer. According to the statement made in his opening by the plaintiff's counsel, the defendant procured the money sued for by means of fraud in an oil land speculation. It is claimed by the defendant that all the facts in respect to the alleged fraud should have been distinctly stated in the complaint, otherwise the plaintiff is not entitled to prove them. On the other hand, it is claimed that all it is necessary the complaint should contain is substantially an allegation that the defendant has received a certain amount of money to the use of the plaintiff, as in the old form of a declaration in *indebitatus assumpsit*. We are inclined to sanction this latter view, and to hold that the facts, which, in the judgment of law, create the indebtedness or liability need not be set forth in the complaint. If the complaint does not state with sufficient certainty the facts in respect to the defendant's obtaining the money from the plaintiff, the better practice is to move to have the pleading made more definite and

certain. But we really do not see any more reason for requiring the complaint to state all the facts and circumstances about the manner the defendant obtained or received possession of money which in equity and good conscience he ought to pay over to the plaintiff, than, in case of a payment or loan of money, to require the pleading to contain all the facts in respect to such loan or payment. A complaint alleging that the defendant was indebted to the plaintiffs in a specified sum for goods sold and delivered to the defendant at his request, and that such sum was due, was held to be sufficient on demurrer in Allen v. Patterson, 7 N. Y. 476. Also a complaint to recover for money lent to and paid, laid out and expended for the defendant, at his request, was held sufficiently definite and certain on motion in Cudlipp v. Whipple, 4 Duer 610. The statement of the fact showing that the defendant had received money to the use of the plaintiff, which he was bound to pay over to him, was of the most general character, in Bates v. Cobb, 5 Bosworth 29; Adams v. Holley, 12 How. Pr. 326; Betts v. Bache, 14 Abb. Pr. R. 279; Sloman v. Schmidt, 8 do. 5; Goelth v. White, 35 Barb. R. 76, and yet the actions were sustained.

The case of Lienan v. Lincoln, 2 Duer 670, is cited by the defendant's counsel in support of the position that a general allegation in a complaint that the defendant has received money to the use of the plaintiff is bad on demurrer. But a just criticism upon this case will be found in note 4, p. 213, Tiff. & Smith, N. Y. Prac. The editor says that, although the head note in Lienan v. Lincoln, states such a doctrine, yet that the complaint there alleged that the defendant was indebted to the plaintiff's assignor "for moneys, *notes*, and *effects* before that time had and received," while the account annexed showed that more than all the balance claimed consisted of promissory notes received by the defendant, and there was no allegation that these notes had been paid so as to render the defendant liable for their amount. In the case before us it is, in substance, averred that the defendant received from the plaintiff five hundred and thirty-five dollars to the use of the plaintiff; that the plaintiff has demanded the payment thereof; and that the defendant has refused to pay the same or any part thereof. We are inclined to hold this complaint sufficient in substance.[5]

[5] For the contrary view, that the facts must be pleaded, see Moser v. Pugh-Jenkins Furniture Co., L. R. A. 1918 F. 437, annotated.

By the Court: The judgment of the circuit court is reversed, and a new trial ordered.

NEW YORK NEWS CO. v. NATIONAL STEAMSHIP CO.

Court of Appeals of New York, 1895. 148 N. Y. 39.

O'BRIEN, J. The complaint in this action alleged that the defendant was indebted to the plaintiff in the sum of $591.18, a balance due from defendant for work, labor and services in advertising for and at the special instance and request of the defendant. The defendant, by its answer, denied this allegation. The plaintiff, on the trial, gave proof tending to establish an agreement between the parties to the effect that the plaintiff should do certain advertising for the defendant, and be paid therefor in the tickets of the defendant; that plaintiff did perform the work in advertising, and had received thereon a certain quantity of tickets, but leaving still due the amount stated in the complaint; that the plaintiff had demanded the balance of the bill from the defendant in tickets, but the demand was refused. The plaintiff claimed that these facts established a money indebtedness from the defendant. The rule in this state seems to be that, where a party agrees to pay a specific sum, or, as in this case, the value of the services in some specific articles of property, and upon demand refuses or fails to deliver the property, his obligation is thereby converted into one for the payment of money. 1 Sedg. Dam. (8th ed.) § 280; Gleason v. Pinney, 5 Cow. 152; Smith v. Smith, 2 Johns. 235; Brooks v. Hubbard, 3 Conn. 58. There was some conflict in the evidence as to the facts, but the court submitted all the questions to the jury, and the verdict must be taken as establishing in plaintiff's favor, the performance of the work at the price alleged, the agreement to pay in tickets, and the refusal to do so, and the consequent obligation to pay in money.

The only point urged by the defendant in support of the appeal which it is necessary to consider is the contention that the plaintiff set out in the complaint one cause of action and recovered upon another and different cause of action. The plaintiff has stated the facts constituting the cause of action, not as they

actually existed, but according to their legal effect. In most cases either mode of pleading, at the option of the party, is correct. Bennett v. Judson, 21 N. Y. 238; Farron v. Sherwood, 17 N. Y. 227; Barney v. Worthington, 37 N. Y. 116. In pleading facts according to their legal effect, it may sometimes happen that the opposite party is left in the dark as to the proof which he may be required to meet at the trial, but, ordinarily, this difficulty can be avoided by motion, when necessary, to make the pleading more definite and certain. In this case, if the defendant had any doubt as to the identity of the claim that it was required to defend, a simple demand for a bill of particulars, or a motion, would make everything clear. The material part of the complaint was the allegation of a money indebtedness by defendant to plaintiff, and that allegation was supported by proof of the agreement to perform the work for payment in tickets, the performance of the work, and the refusal to deliver the tickets. In other words, the fact pleaded, according to its legal effect, was proved by proof of the facts as they existed. So there was no variance[6] that the defendant can complain of. The other questions discussed relate to the proofs given. It is not very clear, but its sufficiency and interpretation were for the jury. The judgment must, therefore, be affirmed. All concur.

Judgment affirmed.

POTTER v. CHICAGO & NORTHWESTERN RY. CO.

Supreme Court of Wisconsin, 1866. 20 Wis. 533.

This was an action by the administrator of Frances L. Bishop against the defendant, for negligently causing the death of said

6 For the use of a common count to recover the contract price where the special contract has been performed, see Farron v. Sherwood, 17 N. Y. 227, ante, p. 41.

For a common count for goods sold and delivered on the theory of a waiver of tort, see Walker v. Duncan, 68 Wis. 624, ante, p. 48.

The common counts are not appropriate for a cause of action arising from the breach of the conditions of a penal bond, Gallup v Jeffrey, 86 Conn. 308, (1912).

For a collection of cases on the use of the common counts, see Weber v. Lewis, 34 L. R. A. (N. S.) 364, (1910), annotated.

Frances, a child about ten years old, who with her mother, was a passenger on the defendant's train from Chicago to Fort Atkinson. The complaint alleged that the defendant so negligently and unskilfully conducted itself in the management of said train, that when the same arrived at Fort Atkinson, it did not stop the same long enough to permit said Frances or her mother to get off the car in which they were traveling, but carelessly started said train, when they were getting off, so quickly and suddenly that the said Frances, while attempting to get off, was thrown off the car, or the platform of the car, and run over by the train, and instantly killed. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action; and appealed from an order overruling the demurrer.

Downer, J.—It is contended that the complaint is insufficient because it does not aver that the deceased, at the time of the fatal accident, was in the exercise of ordinary care, or was free from negligence on her part. The complaint alleges that the injury was caused by the negligence of the defendant. The complaint in this respect is according to most of the precedents of declarations, English and American. There are, however, precedents with averments in form that the plaintiff was in the exercise of ordinary care, or was free from negligence on his part. In Gough v. Bryan, 2 M. & W. 770, the declaration, as to the particular matter under consideration, was in the form of the complaint before us, and was for driving the coach of the defendant against the plaintiff's carriage and thereby injuring his sons. The defendant plead the general issue, and also a special plea setting up the plaintiff's negligence. On demurrer to the special plea, it was held bad, as amounting to the general issue. In the case of Bridge v. The Grand Junction Railway, 3 M. & W. 244, the declaration was in the same form; and on a demurrer to a special plea setting up that the injury was caused by the negligence both of the plaintiff and defendant, it was held that the plea was bad because it amounted to the general issue; and also bad in substance, because it was not sufficient to aver that there was negligence on the part of the plaintiff, but the defendant must also aver that the plaintiff, by ordinary care, could have avoided the consequences of the defendant's negligence. The case of Butterfield v. Forrester, 11 East 60, was cited as authority to that effect. It was also said by Park, B.,

that even if the plea had contained such allegation, it would still be equivalent to not guilty. I do not see how this could be, unless the general denial put in issue the want of ordinary care, or the negligence, of the plaintiff as well as that of the defendant. If the declaration in each of these cases had been defective, the demurrer to the special plea in each case would have reached back to the declaration as the first defective pleading; but it did not occur either to the counsel or the court that there was any defect in the declaration in either case. And we have not been referred to any case where such declaration has been held defective. In many of the cases (a number of which have been cited by counsel), where the question has arisen whether the plaintiff was bound, in order to make out a prima facie case, to prove that he exercised ordinary care, the declaration was in the form of that in the case before us. The averment that the death of Frances L. Bishop was caused by the negligence of the defendant, must, we think, be regarded in legal effect the same as though it had been averred that the *sole immediate*[7] cause thereof was the negligence of the defendant. It is unnecessary for us to decide the question, so much discussed by counsel, whether the plaintiff, at the trial, to make out a *prima facie* case, must prove both the negligence of the defendant and ordinary care on the part of the deceased; for whatever may be our opinion on that subject, we must hold, in accordance with long and well established practice, that the complaint is sufficient.[8]

Judgment affirmed.

[7] And so in Lee v. Troy Gas Co., 98 N. Y. 115.

For the view that an express allegation negativing contributory negligence is necessary, see Jemison v. Myrtle Lodge, 158 Ia. 264, (1915); a number of the cases have been collected in note to Oklahoma City v. Reed, 33 L. R. A. (N. S.), loc. 1152.

[8] In a majority of states where the question has arisen, the courts have taken the view that contributory negligence is an affirmative defense and hence need not be negatived in the complaint.

Wagner, J., in Thompson v. North Missouri R. R. Co., 51 Mo. 190, (1873): * * *

"The question as to the burden of proof in respect to plaintiff's freedom from negligence, and as to whether he should make the affirmative averment, that he exercised proper care and was free from negligence, is new in this Court, and is involved in uncertainty by the conflicting and evasive decisions of the Courts of other States. While some Courts hold that he must allege and affirmatively establish that he was free

FIELD v. C. R. I. & P. RY. CO.

Supreme Court of Missouri, 1882. 76 Mo. 614.

Henry, J. This is a suit to recover damages for the destruction of a growing crop of corn on plaintiff's land, and, after relating plaintiff's ownership of the land, and that defendant had for years past been using a strip of said land for a right of way and running its train of cars over it, the cause of action is thus stated: "That defendant failed to keep its road in such condition as to prevent injury to the plaintiff; but negligently and carelessly failed to make, and keep open, proper ditches for the purpose of leading the water off the plaintiff's land; and in consequence of the careless and negligent conduct of the defendant, as aforesaid, the water was dammed up, and caused to flow back, and over the land of plaintiff, and destroy his growing crop, to his damage, etc." The defendant objected to the introduction of any evidence because no cause of action was stated in the petition, but the court overruled his objection, and on the trial the

from culpable negligence contributing to the injury, others hold that his negligence is matter of defense, of which, the burden of pleading and proving rests upon the defendant.

In my view the latter is the correct doctrine. Negligence on the part of the plaintiff is a mere defense, to be set up in the answer and shown like any other defense, though of course it may be inferred from the circumstances proved by the plaintiff upon the trial. It seems to be illogical and not required by the rules of good pleading, to compel a plaintiff to aver and prove negative matters in cases of this kind. In an ordinary complaint upon negligence, it is not necessary to aver that the plaintiff has taken due care.

It is true the action may be defeated by showing that the plaintiff was guilty of such contributory negligence as would preclude a recovery, but that is a question for the jury, to be determined upon the evidence, and not a matter of pleading. I cannot see what possible ground of distinction there can be between the rule forbidding a plaintiff to recover when his negligence has contributed to the injury, and that which prevents a recovery for a fraud or trespass when the parties are in pari delicto. Yet it would be difficult to find a case in which it has been held that the plaintiff in such actions must assume the burden of showing himself free from fault. (Shearm. & Redf. on Negl. p. 47)." * * *

And so in Clark v. Ry., 28 Minn. 69, ante, p. 304.

For a collection of the cases following this view, see 33 L. R. A. (N. S.) loc. 1157.

plaintiff obtained a judgment from which the defendant appeals. In his motion in arrest, defendant also made the objection that no cause of action was stated in the petition.

The complaint in the petition, and the only cause of action alleged, is "that defendant failed to keep its road in such condition as to prevent injury to plaintiff, but negligently failed to make, and keep open, proper ditches for the purpose of leading the water off of plaintiff's land." Placing the most favorable construction upon the petition, which is to take it as alleging "that defendant failed to keep its road in such condition as to prevent injury to plaintiff's land, by negligently and carelessly failing to make, and keep open, proper ditches to lead the water off plaintiff's land," it does not state a cause of action. It is not alleged that the railroad-bed was raised above the surface of plaintiff's land through which it passed, and if on a level with that surface it could not have obstructed the flow of surface water. If, on the other hand, it made an embankment where it ran through his land, the statute only requires ditches sufficient to carry off the surface water, along the sides of the embankment; and we know of no statute or principle of the common or civil law, which, on the facts stated in this petition, requires the railroad company to open ditches for the purpose of draining the land of an adjoining proprietor. There is no allegation that the company constructed its road so as to obstruct the flow of surface water and throw it back upon the plaintiff's land, and failed to make and keep open the ditches required by that statute, along the side of its road.

No facts are alleged in the petition which show any legal obligation upon the defendant to do what the plaintiff complains of its omission to do, and, when a suit is for a breach of duty, the facts out of which it arises must be pleaded.[9]

If the nature of the complaint can be conjectured from the plaintiff's petition, it is of an obstruction of the flow of surface water. It is an insufficient statement of a cause of action in that view.

On the trial, plaintiff was permitted, over defendant's objec-

[9] And so in Ry. Co. v. Lightheiser, 163 Ind. 247, (1901), where the plaintiff, an employee of the railroad company, was struck by a backing train, and complained of the failure of the defendant to place a brakeman on the rear car to give warning, etc., without stating any facts which would impose a duty to take such precaution.

tion, to prove the obstruction of a running stream, and yet no one would construe the petition as stating such a cause of action. The plaintiff must state the facts which constitute his cause of action. He cannot state one and prove another, nor, if he states none, can he supply the defects in his petition by evidence at the trial.

All concur in reversing the judgment and remanding the cause.

BARKER v. H. & ST. J. R. R. CO.

Supreme Court of Missouri, 1886. 91 Mo. 86.

RAY, J. The petition on which this cause was tried is as follows: "Plaintiff states that upon the —— day of ———, she was lawfully married to Edward B. Parker, deceased, late of Buchannan county, and at the times hereinafter mentioned she was the wife and now is the widow of said deceased, Edward B. Barker.

"Plaintiff states that the defendant now is, and at the times hereinafter mentioned was, a corporation, etc. * * *

"That the defendant, on the fifteenth day of April, 1879, by its servants, agents, and employees, carelessly, negligently, unskillfully, and recklessly, ran one of its engines and trains of cars upon and over the said Edward B. Barker, and thereby struck and inflicted grievous bodily injury upon the said Edward B. Barker, by reason of which the said Edward B. Barker was then and there instantly killed.

"Plaintiff states that Edward B. Barker, was run over and killed, as aforesaid, within one year before the commencement of this suit, and at a point on the defendant's railroad track between the said city of St. Joseph, and the said town of Easton, about one mile southeast of the said city of St. Joseph."

"Plaintiff states that the deceased, Edward B. Barker, was run over and killed, as aforesaid, by the defendant, without any fault or negligence whatever on the part of the said deceased."

"Wherefore, plaintiff prays judgment against defendant for the sum of five thousand dollars, according to the statute in

such case made and provided, together with the costs of this action." * * *

The trial resulted in a verdict in plaintiff's favor, for the sum of five thousand dollars. * * * Judgment was entered upon the verdict, and the case appealed to this court.

The plaintiff and her deceased husband resided near defendant's tracks, about two or three miles from St. Joseph, and about eight or nine o'clock, in the morning of April 15, 1879, the plaintiff's husband, while walking along the track, in the direction of St. Joseph, and about one hundred yards from his residence, was run over and killed by one of the defendant's passenger trains, coming from the east and going towards St. Joseph. This action was begun in the Circuit Court of Buchannan county, April 9, 1880, or a year, lacking a few days, thereafter. The object of the action was to recover damages for the husband's death, occasioned, as alleged, through defendant's negligence in running said train. In the view we take of a controlling question presented by the record, we deem the foregoing a sufficient statement of the case.

It will be observed that the suit was instituted more than six months after the death occurred, but within the year, and that there is no averment in the petition that there were no minor children, and, we may further add, that there is nothing in the evidence or record that discloses whether or not there were such minor children. The statute provides that such damages as are here sought to be recovered may be sued for "first by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or third, if such deceased be a minor, and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either be dead, then by the survivor." R. S. 1879, sec. 2121. Section 2125, Revised Statutes, provides that every action instituted by virtue of the preceding section of the chapter shall be commenced within one year after the cause of such action shall accrue.

It is contended, for the appellant, that the right of action is vested, and only remains in the wife, absolutely, for the said period of six months, and that her right to sue, after the expiration of the six months, is conditional on the fact whether or not there are minor children, and that the petition is fatally defec-

tive, for the want of a further averment, alleging that there were no minor children. On the other hand, it is contended, for the respondent, that the provisions of the statute, as to the time in which the wife may bring her action, are not conditions, but are in the nature of a limitation, only—that they merely affect the remedy, and limit the enforcement of the right—and that the lapse of the six months being such a limitation, it was not necessary for the plaintiff to allege the non-existence of minor children in the petition; but that the same was a defense to be pleaded and proved by the defendant. This presents the controlling question, to which reference has been already made.

It may be observed that damages for a tort to the person, resulting in death, were not recoverable at common law, nor could husband or wife, parent or child, recover any pecuniary compensation therefor against the wrongdoer. Our statute, on this subject, both gives the right of action, and provides the remedy, for the death, where none existed, at common law, and where an action is brought, under the statute it can only be maintained subject to the limitation and conditions imposed thereby. In conferring the right of action, and in providing such remedy, in designating when, and by whom, suits may be brought, it was, as a matter of course, competent for the legislature to provide and impose, such conditions as it might deem proper, and the conditions thus imposed modify and qualify the right of recovery, or form, rather, we think, a part of the right itself, and upon which its exercise depends. In the statute which creates the right of action, and in the same section in which the statutory right and remedy is thus conferred upon the husband or wife, it is further provided, by the second sub-division, as we have seen, that, if there be no husband or wife, or he or she fails to sue in six months after the death, the right of action therefor shall be vested in the minor children of the deceased, if there be such. This provision is not, we think, merely a *limitation* or bar to the *remedy* of the wife, but is a bar to the *right* itself, if there are minor children, and the existence, or non-existence of such minor children is to be held, we think, as of the *substance* of the right of the wife to sue after the six months have expired. The right of the husband or wife to sue is absolutely for and during the six months after the death. Thereafter, it is within the year, as we think, a conditional right. It is not a proviso, exception, or limitation, enacted in a separate clause or section, but is incor-

porated, as we have said, in the statute and section which gives the right of action and authorizes her to sue and recover the damages. That this proviso, or condition, is something more than a mere limitation upon the remedy of the widow, is, we think, more apparent from a further consideration of the section, and the other clause thereof. For example, the right of the parents to sue under the third sub-division is based upon the fact whether the deceased was a minor, unmarried, which are, we think, conditions precedent to a recovery on the part of the parents. Suppose, for example, that, in an action by them, under the statute, it was neither averred in the petition nor proved on the trial, that the deceased was a minor, and unmarried, could a recovery be had? Again, suppose, for example, the minor child or children brought the action within six months from the death; or, suppose further, that such minor children instituted suit after the expiration of the six months, and it was neither alleged in the petition nor shown by the evidence, that there was no husband or wife, or that the husband or widow, as the case might be, had failed to sue in the six months.

In none of these cases could a recovery, as we think, be properly had; or again, suppose that, as a matter of fact, there are in this case, minor children, and, as we have said, there is nothing to show whether there are or not, and there is, we think, no presumption of law or fact to be indulged, as to whether there are or not, could they be deprived or barred of their right of action, expressly conferred upon them by the statute and duly brought within the year, by a recovery on the part of the widow in an action brought by her after the expiration of the six months? We think not. 31 Mo. 574. So in the case now before us, where the action is brought by the widow after the expiration of the six months, her right to maintain the same is conditional and depends on the non-existence of the minor children, a material and necessary fact, as we think, and which was not alleged or proved. Section 2125, above set out, is, we think, a statute containing a limitation of time only, and applies to the remedy or enforcement of the rights conferred by the damage act. Its existence as a bar depends, not upon the existence of any party, or upon any thing else beside the mere lapse of the period of time designated. In regard to such statutes, and other statutes of limitations of like import, not thus coupled with, or annexed to, the right of action, the grounds urged by

respondent, and the authorities cited, in the main apply, we think, with more force.[10]

As in our judgment the fact, if such it is, that there was no minor child, was one material and necessary to be shown, to entitle the plaintiff to recover in this action, which was begun after the six months had expired, and as there was no evidence offered in that behalf, the instruction in the nature of a demurrer to the evidence, asked by the defendant at the close of the evidence, should have been given. And in the absence of the proper averment in the petition, and in the failure of the proof as to whether there were such minor children, we feel constrained to reverse the judgment and remand the cause. Authorities are not wanting, we think to support these views. Some of them are referred to in the brief of appellant, but, as we are led to the conclusion we have reached, by a construction of our statute on the subject, the authorities need not all be specially cited or quoted. Railroad v. Hine, Adm'r, 25 O. St. 629, 634; Wood on Lim. of Acts, sec. 9, p. 23.

Our own court has had occasion to construe the statute in question (section 2121, *supra,*) in cases somewhat kindred to this. In the case of Coover v. Moore, 31 Mo. 574, 576, it was held that, where the person killed left minor children, if the husband or wife of the deceased failed to sue within six months after the death, the right of action of the wife or husband is barred and gone, and that of the minor children vested absolutely. It is further said, that "there being thus no general right of recovery, open to all persons, representing the estate of the deceased, or interested in his life, *only* such persons can recover in such time, and in such manner as is set forth in the statute." * * * In statutory actions of this sort, the party suing must bring himself strictly within the statutory requirements, necessary to confer the right, and this must appear in his petition; otherwise, it shows no cause of action.[1]

For these reasons, the judgment of the circuit court is re-

[10] See Sharrow v. Inland Lines, 214 N. Y. 101, (1915), construing a somewhat similar provision of the New York Act, as an ordinary statute of limitations, and hence that the complaint need not show affirmatively that the action was brought within the statutory period.

[1] Followed in Chandler v. C. & A. R. R. Co., 251 Mo. 592, (1913). For a collection of the cases, see Sharrow v. Inland Lines, L. R. A. 1915, E. 1192, annotated.

versed and the cause remanded. All concur, except Sherwood, J., absent.

KING v. OREGON SHORT LINE R. R. CO.

Supreme Court of Idaho, 1898. 6 Idaho, 306.

This action was brought by the respondent to recover the value of four head of cattle alleged to have been killed by appellant's locomotives and cars,—one alleged to have been killed on May 7, 1897; one on May 10, 1897; one on August 5, 1897; and one on November 5, 1897. The killing of each animal is set up as a separate cause of action. The third paragraph of each cause of action, which contains the allegations of the careless and negligent killing of said stock, is couched substantially in the same language, and in the first is as follows: "That the defendant, by its agents and servants, not regarding its duty in that respect, so carelessly and negligently ran and managed its locomotives and cars that the same ran against, upon, and over said steer, and killed and destroyed the same, to the damage of the plaintiff in the sum of $18, no part of which has been paid." The total value of the four head is alleged to have been $78. To each of said causes of action the defendant, who is appellant here, interposed a demurrer, on the ground of uncertainty,[2] and distinctly specifies that each of said causes of action is uncertain in several particulars, and among them the following: (1) It does not state any facts constituting negligence or carelessness on the part of any agent or servant of the defendant, or of the defendant; (2) it does not state any act or omission on the part of any agent or servant of the defendant, or of the defendant, or of any one, constituting negligence or carelessness. The demurrer was overruled, and appellant declined to answer or further plead, whereupon judgment was given and entered in favor of the plaintiff. This appeal is from the judgment.

SULLIVAN, C. J. There is but one question presented by the

2 The Code of Idaho, R. S. 1919, § 6689, makes uncertainty a ground of demurrer. Under most of the codes such an objection could only be taken by motion to make the complaint more specific.

record, and that is: In actions based on negligence, is it sufficient to plead negligence generally, or must the specific acts of commission or omission be specifically set out in the complaint? It is conceded by counsel for appellant that the complaint in this action would be good as against a general demurrer, towit, a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, and that it is sufficient to sustain a verdict or judgment, unless attacked by a demurrer on the ground of uncertainty, specifically setting forth wherein it is uncertain. While counsel for the respondent concede that, if the facts are sufficiently within the knowledge of the pleader, it would be better pleading to plead them, they also contend that the rule of pleading negligence is so thoroughly settled in this country that it is no longer an open question, and the rule is to the effect that it is unnecessary to plead the particular acts or omissions that constitute the negligence, and cite Bliss, Code Pl. (3d Ed.) § 211a; Cunningham v. R. R. Co. (Cal.) 47 Pac. 452; Stephenson v. Southern Pac. Co. (Cal.) 34 Pac. 618; and numerous other cases. It is said in Bliss, Code Pl. (3d Ed.) § 211a, that a general allegation of negligence is allowed; that negligence is the ultimate fact to be pleaded, and is not a conclusion. Referring to negligence and fraud, it is said: "The law draws the conclusion in both cases, yet we can see that the negligence possesses more of the element of fact than does fraud. * * * We do not infer it as a legal conclusion from certain facts, but it is a fact itself inferable from certain evidence. * * * Fraud will never be presumed. The facts from which it is inferred must be shown." And, after giving some examples and citing authorities, the author concludes said section as follows: "Some negligence is presumed, and it must, of necessity, be alleged generally." Simply because "some negligence will be presumed," certain facts being shown, we are unable to comprehend that for that reason "negligence must, of necessity, be alleged generally." If certain facts must be shown before negligence will be presumed, the plaintiff must know these facts before he can show them; and if he knows them, he certainly can allege them, and thus inform the defendant of the specific facts from which the conclusion of negligence is drawn. If, under the laws of this state, the killing of a steer by a locomotive, engine or train of cars were made *prima facie* evidence of negligence, then, such killing being alleged in the

complaint, a cause of action would be stated. But, under the statutes of this state, something more than the killing must be shown, in order to entitle the plaintiff to recover. He must not only show the killing, but he must show the certain other fact or facts from which the conclusion of negligence will be inferred or drawn. And, if a plaintiff must show acts or omissions from which negligence will be inferred before he can recover, it certainly is no hardship on him, nor unreasonable, to require him to allege them. Subdivision 2, § 4168, Rev. Sts., provides that the complaint must contain "a statement of the facts constituting the cause of action in ordinary and concise language." The causes of action in this case are based on the negligent killing of certain animals. Under said provision of the statute, the complaint must contain a statement of the facts constituting the negligent killing, in "ordinary and concise language." In Stephenson v. Southern Pacific Railroad Company, *supra*, the facts constituting the negligence were stated in the complaint in ordinary and concise language. The court, after stating that at common law it was necessary, in a declaration for negligence, to set out the facts, in detail, constituting the basis of the action, says: "In adopting what is known as 'the code system of pleading,' courts in most of the states have excepted from the general rule, requiring a complaint to state the facts constituting the cause of action in ordinary and concise language, cases founded upon negligence, or, rather, they have so far modified the rule as to permit the plaintiff to state the negligence in general terms, without stating the facts constituting the negligence." If it be true that the courts of most of the states have excepted from the general rule, which requires a complaint to state the facts constituting the cause of action in ordinary and concise language, cases founded on negligence, or, rather, have so far modified that provision of the statute as to permit the plaintiff to state negligence in general terms, without stating the facts constituting the negligence, this court is not inclined to follow them. No doubt, we have much good court made law; but when we have a plain provision of the statute,—too plain for construction,—if it requires modification, the legislative department of the state may do that. This court will not undertake it. The legislature has furnished the basis of decision as to the facts a complaint must contain, and courts are bound by it. In the case last cited the court further said: "The statement

of other facts auxiliary to this main fact (negligence) might have tended to a clearer conception of the principal act, but the most that can be said against the pleading is that it states a cause of action, but states it imperfectly, which is the equivalent of saying that it is good except against a special demurrer." So we think in the case at bar the complaint sufficiently states a cause of action, except as against a special demurrer on the ground of uncertainty. The demurrer should have been sustained, and the plaintiff permitted to amend his complaint by setting forth the facts constituting the negligence. In Woodward v. Navigation Co. (Or.), 22 Pac. 1076, which was a case founded on negligence, the court says, "Our code (section 66) requires the complaint to contain a plain and concise statement of the facts constituting the plaintiff's cause of action, and one of the great objects to be attained by this enactment was to compel the plaintiff to place upon the record the specific and particular facts which he claims entitles him to recover," and holds that the plaintiff must allege in the complaint the acts or omissions of the defendant causing the injury, and show that they occurred through or by the negligence of the defendant. That decision recognizes the fact that in some jurisdictions it is sufficient to allege generally that the injury complained of was negligently done, but declares that that method of pleading has not been approved in that state. In McPherson v. Bridge Co., 26 Pac. 560, the supreme court of Oregon holds that in actions for negligence a general allegation of negligence does not charge a fact. In Batterson v. Railway Co., 13 N. W. 508 (a case from Michigan), the court held that the plaintiff, in negligence cases, is "bound to set out the combination of material facts relied upon as his cause of action, and follow up his allegations by evidence pointing out and proving the same combination of circumstances." See, also, Car Co. v. Martin (Ga.), 18 S. E. 364; Steffe v. Railroad Co. (Mass.), 30 N. E. 1137; Conley v. Railroad Co. (N. C.), 14 S. E. 303; Price v. Water Co. (Kan. Sup.), 50 Pac. 450. We are aware that there is a very respectable authority which holds that a general allegation of negligence is sufficient, and that at common law it was not necessary, in a declaration for negligence, to set out the facts constituting the negligence. But our code of civil procedure has greatly changed the common law rules of pleading, and requires the facts constituting the cause of action to be set forth in ordinary and

concise language. And in the case at bar facts sufficient should have been set forth to inform the defendant what act or omission constituted the negligence complained of.[3] The judgment of the court below is reversed, with instructions to sustain the demurrer, and to give the plaintiff leave to amend his complaint. The costs of this appeal are awarded to the appellant.

Judgment reversed.

BERRY v. DOLE.

Supreme Court of Minnesota, 1902. 87 Minn. 471.

START, C. J. Appeal by the plaintiff from an order of the district court of the county of Hennepin sustaining a general demurrer to his complaint. The here material allegations of the complaint are to the effect following: That on and for a long time prior to June 29, 1900, the defendants maintained in a public street of the city of Minneapolis a wooden structure or bridge over the gutter therein to facilitate passage of teams and wagons of their tenants and their customers into an alley upon their premises, and invited the public and the plaintiff to use the same; that on that day the wooden structure or bridge was, and for a long time prior thereto had been, in a defective, rotten and unsafe condition, which condition was well known to defendants, although plaintiff had no notice or knowledge thereof; that on that day plaintiff, in the course of his employment as a servant of a customer of one of the defendant's tenants, was lawfully and with due care, and by invitation of the defendants, driving over the bridge, from the alley to the street, a loaded wagon, upon which he was seated, when the bridge suddenly, and without fault of plaintiff, broke down and gave way under the wagon, and thereby caused it to lurch suddenly to one side, and throw

[3] For a collection of the cases on this point, see notes of the principal case in 59 L. R. A. 209.

For a discussion of a general charge of gross negligence, see Herrem v. Kong, 165 Wis. 574, (1917).

In actions against common carriers, the charge of negligence may be made in quite general terms, Lang v. Brady, 73 Conn. 707, (1901).

plaintiff therefrom, head foremost, violently to the pavement of the street, whereby he sustained serious personal injuries. As against a demurrer, the facts essential to a cause of action must be directly alleged, and not by way of recital, inference, or argument. Tested by this rule, the complaint does not state a cause of action, in that it contains no allegation that the plaintiff was injured by reason of any negligent act on the part of the defendants. It is true that it alleges the disrepair and the unsafe condition of the bridge but it does not allege the fact that it was the defendant's duty to keep it in repair, nor that the bridge broke down and gave way under the wagon by reason of an act or omission of the defendants, or its alleged condition. Such ultimate facts may possibly be inferred from the facts alleged, and probably would be in support of a pleading, if the question of its sufficiency was raised for the first time in this court, or after verdict, but will not be as against a demurrer.

Order affirmed.

CONWAY v. REED.

Supreme Court of Missouri, 1877. 66 Mo. 346.

This was an action for damages sustained by respondent in consequence of the alleged unlawful and wrongful shooting of him by the appellant, whereby the amputation of his left leg was rendered necessary, and other injuries were suffered by him. In addition to the denial of the allegations of the petition, the answer set up, as a special defense, that appellant and respondent, and other boys about their own age, twelve or thirteen years, were out playing together, having a gun, and that in the course of their talk and play, whilst the gun was in the hands of appellant, without any fault or negligence, or design on the part of appellant, the gun, without being aimed at or directed towards the respondent, accidentally went off and was discharged, and by accident alone shot respondent, from which he suffered and had to have his leg amputated. On the trial evidence was offered by appellant tending to show that the shooting was purely accidental and unintentional, and, by respondent, that it was owing to the carelessness and negligence of appellant.

The jury rendered a verdict in favor of the respondent for one thousand dollars. * * *

HENRY, J. An infant is liable for a tort in the same manner as an adult. Bullock v. Babcock, 3 Wend. 391; Campbell v. Stakes, 2 Wend. 138; Vasse v. Smith, 6 Cranch, 230; Morgan v. Cox, 22 Mo. 374.

It is contended by appellant that, because the petition alleged that defendant unlawfully and wrongfully assaulted the plaintiff and shot him with a gun, evidence of a negligent or careless shooting would not sustain the averment in the petition; in other words, that the petition alleged one cause of action and the evidence established another, if any. Bullock v. Babcock, *supra*, was an action of trespass for assault and battery. The defendant was a boy about twelve years of age, and the evidence showed a negligent shooting of plaintiff by defendant with an arrow from a bow, and it was held sufficient to entitle plaintiff to a judgment.

In Morgan v. Cox, defendant was an infant. The petition in that case alleged a negligent killing of plaintiff's slave by the defendant, but there is no intimation in the opinion of the court that, if the petition had alleged, as in this case, that defendant unlawfully and wrongfully shot the slave, the evidence that it was the result of carelessness, would not have established the cause of action stated in the petition. Leonard, J., said: "The facts of the present case would, under the former system of procedure, have supported an action of trespass, and cannot, we think, be distinguished from the cases cited. In one of them the party, in uncocking his gun, accidentally discharged it and wounded a bystander. Here, the defendant accidentally struck the hammer of his gun against his saddle, and the same result ensued. In both cases it was upon the defendant to show that it happened, as the books say, by inevitable accident, and without the least fault, and the change that has been introduced by the new code in the remedy has not changed the rules of law as to the liability of the parties." The change introduced by the new code in the remedy did not go to the extent of requiring less or more material allegations in a petition than were necessary to constitute a cause of action at common law, but only obviated the necessity of using those formal and technical averments which, it had been held, were necessary, and for which no other mode of stating the same thing could be substituted. The

change introduced, to which the very able judge, who delivered that opinion, alluded, was that made by the first section of the act of December, 1865, Revised Statutes of 1855, page 1216, which provided that there should be but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, to be denominated a civil action; and in the third section of article 6, page 1229, requiring in a petition "a plain and concise statement of the facts constituting the cause of action without any unnecessary repetition."

These sections have been retained in the subsequent revisions. Is it true that the proof of a negligent shooting does not sustain an averment of a wrongful and unlawful shooting? With regard to the liability of the defendant, the law holds an injury inflicted through carelessness as wrongful and unlawful; if accidental and inevitable no blame attaches to the person inflicting the injury. He is then, in no sense, culpable. If the act was lawful and right, which is the converse of the proposition, the party inflicting the injury through negligence could not be held liable, and is only responsible because it was unlawful and wrongful.

At common law the plaintiff was held to prove the cause of action alleged in his declaration, with as much strictness as under the code, and yet an action of trespass for assault and battery, as we have seen, was the proper form of action for direct injuries negligently and carelessly inflicted, as well as those which were intentional and malicious.

The celebrated case of Scott v. Shepperd, reported in 2 Wm. Black, 892, and cited and commented upon as often, perhaps, as any case in the books, was an action of trespass for assault and battery. Weaver v. Ward, Hobart 134, cited by Judge Leonard, was in the same form of action. There the defendant, a soldier, had accidentally shot his comrade while exercising. In all these cases the plaintiffs maintained their actions, although the injuries received by them were proved to have been the result of accidents, and not intentionally committed. In none of them was it alleged in the declaration that the injury was occasioned by the negligence of the defendant. "In declarations in trespass, which lies only for wrongs immediate and committed with force, the injury is stated, without any inducement of the defendant's motive and intention, or of the circumstances under which the injury was committed." 1 Chitty's

Pleadings, 387, 127. The court properly overruled the defendant's demurrer to the evidence. * * *

Judgment affirmed.

GUMB v. TWENTY-THIRD ST. RY. CO.

Court of Appeals of New York, 1889. 114 N. Y. 411.

Action for damages to plaintiff's person and wagon resulting from a collision with one of defendant's cars. A judgment was rendered in favor of the plaintiff, which was affirmed by the General Term, and the defendant appealed.[4]

FOLLETT, CH. J. * * * The plaintiff was permitted to testify, over defendant's objection, that the evidence was not within the issue, that while suffering from his injury he employed two men to work in his place, paying them $12 and $15 per week each, $135 in the aggregate. When a plaintiff alleges that his person has been injured and proves the allegation, the law implies damages, and he may recover such as necessarily and immediately flow from the injury (which are called general damages) under a general allegation that damages were sustained; but if he seeks to recover damages for consequences which do not necessarily and immediately flow from the injury (which are called special damages), he must allege the special damages which he seeks to recover. It is not alleged in the complaint that the plaintiff expended money in hiring others to work in his place; the defendant had no opportunity of contradicting the evidence, and its reception was error. (Gilligan v. N. Y. & Harlem R. R. Co., 1 E. D. Smith 453; Stevens v. Rodger, 25 Hun 54; Whitney v. Hitchcock, 4 Denio 461; 2 Thompson on Negligence, 1250, §§ 32, 33; 2 Sedg. on Dam. (7th Ed.) 606; 1 Chitty's Pl. (16th Am. Ed.) 411, 515; Mayne on Damages, chap. 17; Heard's Civil Pl. 310-314.) * * *

Judgment reversed.

[4] Statement condensed and part of the opinion omitted.

MORROW v. ST. PAUL CITY RY. CO.

Supreme Court of Minnesota, 1896. 65 Minn. 382.

START, C. J. The plaintiff's intestate, George Morrow, was on March 22, 1895, a conductor in the employ of the defendant, on one of its electric car lines, known as the "Selby Avenue Extension," which connected with its cable line at Milton Street, in the city of St. Paul. While he was engaged, on the day named, in transferring his car from one track to another on the electric line, a cable train collided with the electric car, whereby he received injuries from which he died two days thereafter. This action was brought by his administratrix to recover damages for his death, on the ground that it was caused by the negligence of the defendant. The specific and only acts of negligence on the part of the defendant charged in the complaint are that the gripman operating the cable train was incompetent and unable to manage the same, to the knowledge of the defendant; and the cable, machinery and appliances furnished by the defendant to propel, control and operate the cable train were insufficient and defective. These allegations were put in issue by the answer. There was a verdict for the plaintiff in the sum of $3,500, and the defendant moved the court for a new trial, on the ground, among others, that the verdict was not justified by the evidence, and for errors of law occurring on the trial, and excepted to by the defendant. The motion was granted in general terms, without specifying the particular grounds therefor; * * *.

The court instructed the jury to the effect that the defendant was bound to use due care and caution to provide a safe place for its servants in which to perform the duties assigned to them, and that for any violation of this rule the defendant was liable for damages. The exception to this instruction, and the response of the court thereto, are in these words:

"Mr. Thygeson: I would like at this time to take an exception to that part of the court's remarks, just made, that the defendant is liable in this case because of failure to furnish a safe place in which the servant should be employed, on the ground that there is no such issue in this case. * * *

It is to be noted that the attention of the court was by the exception specifically called to the fact that there was no issue

in the case as to whether the place assigned to the deceased in which to work was unsafe or not. If it was so in fact, by reason of the conditions suggested by the court to the jury, they may have been obvious to the deceased, and he assumed the risks. We have already stated the only acts of negligence on the part of the defendant charged in the complaint, and the charge that the defendant was negligent in not furnishing a safe place for the deceased in which to perform his work was neither alleged nor litigated, by consent or otherwise. The giving of this instruction under these circumstances, when the defendant had no opportunity to meet the charge, was clearly prejudicial error, for which the defendant was entitled, as a matter of right, to a new trial.[5]

Order affirmed.

BENZ v. WIEDENHOEFT.

Supreme Court of Wisconsin, 1892. 83 Wis. 397.

Slander. The material allegations of the complaint were as follows: "That on or about the 22d day of June, 1891, at the county of Ashland, in the state of Wisconsin, the defendant, contriving to injure the plaintiff in her reputation, and to bring her into public contempt and ridicule, did in a public place, in a certain discourse, in the presence and hearing of divers persons, wrongfully and maliciously speak the following false and defamatory words of and concerning the plaintiff, Lizzie Benz: 'The whip was used in the barn. There was some monkey work going on there. I will tell you who it was some other time:'

[5] It is also frequently held that where there is a general charge of negligence in connection with specific acts of negligence, the specifications will be construed as explanatory of the general charge, and the plaintiff should be confined to the specific acts alleged, Waldhier v. Ry., 71 Mo. 514, (1880). It has been held on the same reasoning as in the principal case, that the last chance doctrine should not be submitted to the jury under a complaint not framed to present that issue. Emmons v. Ry., 191 Pac. 333, (Or. 1920); and hence that to a plea of contributory negligence, a reply setting up a last chance doctrine is a departure. Thayer v. Ry., 21 N. M. 380, (1916). See also Daniel v. Prior, 227 S. W. 102, (Mo. Sup. 1920).

and shortly after, to wit, on the 22d day of June, 1891, the defendant, in another discourse, in a public place, and in the presence and hearing of divers persons, in relation to the same matter, unlawfully and maliciously spoke of and concerning the plaintiff, Lizzie Benz, the following false and defamatory words: 'It was Lizzie Benz and Willie Drott that was caught in the barn in the crib;' meaning and intending to convey, by the use of the above language, that the plaintiff and one Willie Drott had been in the crib in the cow barn together for the purpose of having illicit sexual intercourse, and that they were so caught, and that a certain whip was used in driving them out of said barn. By means of which said false and defamatory words so spoken as aforesaid the plaintiff has been injured in her name, fame, and feelings, in the sum of two thousand five hundred dollars." The answer was a general denial.

Upon the trial the defendant objected to the introduction of any evidence under the complaint, because the complaint did not state a cause of action, the language charged not being slanderous *per se,* and not charging any offense. The objection was overruled, and exception taken. A verdict for the plaintiff was rendered, upon which judgment followed, and defendant appeals.

WINSLOW, J. The demurrer *ore tenus* should have been sustained. The words charged to have been uttered are not actionable *per se.* In their usual and ordinary meaning they impute no criminal offense. Their meaning cannot be enlarged by innuendo, and no facts are alleged by way of inducement which tend to show that the meaning to be given them is different from the ordinary or usual meaning. Weil v. Schmidt, 28 Wis. 137.[6] Neither are any special damages alleged. The complaint states no cause of action.

Judgment reversed.

[6] For a more extended discussion, see Christal v. Craig, 80 Mo. 367, (1883).

CORR v. SUN PRINTING ASSOCIATION.

Court of Appeals of New York, 1904. 177 N. Y. 131.

BARTLETT, J.[7] The plaintiff seeks to recover damages for an alleged libel published in the defendant's newspaper, known as The Sun, printed and published in the city of New York.

The defendant interposed a demurrer to the complaint on the ground that it appears upon the face thereof it does not state facts sufficient to constitute a cause of action. The demurrer was sustained, * * * and the complaint was dismissed. The Appellate Division affirmed the final judgment duly entered.

The question involved in this appeal is the proper construction to be given section 535 of the Code of Civil Procedure, which reads as follows: "It is not necessary, in an action for libel or slander, to state, in the complaint, any extrinsic fact, for the purpose of showing the application to the plaintiff, of the defamatory matter; but the plaintiff may state, generally, that it was published or spoken concerning him; and, if that allegation is controverted, the plaintiff must establish it on the trial. * * *"

We are of opinion that the complaint in this case brings it within Fleischmann v. Bennett (87 N. Y. 231), which holds that although the complaint contains the general words of section 535, the defamatory matter was published of and concerning the plaintiff, it does not aid him where this general averment is contradicted and rendered nugatory by other allegations.

This court said: "As the libel neither describes nor refers to the plaintiff, nor to the business in which he was engaged, but names a different business, and a firm of which in a preceding portion of the complaint it is alleged he is not, and never was a member, it is manifest that the plaintiff cannot in any way be connected with the libelous matter set forth. * * * There is no principle which authorizes the introduction of any such evidence, where, on the face of the complaint, it is clearly apparent that the libelous words do not relate to, and have no connection with the plaintiff or his business as stated therein."

In the light of this decision let us examine the libel and the complaint in the case at bar. The libel in substance charges

[7] Dissenting opinion of Vann, J. omitted.

that at two o'clock in the morning, on a Brooklyn street car, a woman of about thirty-five years of age was charged with robbing a sleeping man of his watch; was arrested and at the police station gave her name as Kate Losee, living at 195 Hamburg Avenue and was held in $500 bail; that the police recognized her as Kittie Carr, the daughter of a Brooklyn detective; that several years ago many policemen were infatuated with her—one blew out his brains—the second became insane—the third drank himself to death.

We have here the description of a thief and an abandoned woman, abroad at two o'clock in the morning, robbing a sleeping passenger on a street car. The plaintiff comes into court and avers that this libel was published of and concerning her, and the question is whether this general averment is rendered nugatory by other allegations.

The plaintiff alleges that her name is Kate Corr (not Carr); that she is twenty-six years of age (not thirty-five); that she is a teacher by occupation, employed in one of the public schools of Brooklyn and had always borne a good character and reputation. The libel does not refer to Kate Corr; it describes a woman with a different name.

It is, doubtless, true that an action for libel may be maintained where the plaintiff is not named, but is indicated by circumstances contained in the article which are capable of direct proof that the plaintiff was the person to whom reference was made. Many cases in the lower courts illustrate this situation, as for instance, a plaintiff is referred to by his business, his place of business, his residence, and other facts, rendering it clear that he, and no one else, was referred to in the libel. In such a case section 535 of the Code applies, and it would be sufficient for the plaintiff to aver that the article was published of and concerning him; it would be unnecessary to allege in detail the facts essential to connect him with the libel.

In the case at bar the libel clearly states the name of a woman who does not bear the name of the plaintiff; it portrays a woman who years before was known to the police as a notoriously bad character, at a time when this plaintiff may not have attained her majority, driving men to the insane asylum and the grave—a woman, in the language of the libel, who had "dropped out of sight some three years ago."

We are of the opinion that it appears upon the face of the

complaint that the libel was not published of and concerning the plaintiff, and that the demurrer was properly sustained.[8]

Judgment affirmed.

ST. LOUIS v. KNAPP COMPANY.

Supreme Court of the United States, 1881. 104 U. S. 658.

The city of St. Louis commenced this suit by petition filed in a State court. The suit, upon the application of the defendant, the Knapp, Stout & Company, a corporation created by the laws of Wisconsin, was removed into the Circuit Court of the United States. The defendant, treating the petition as a bill of equity, filed a demurrer, which was sustained. The bill was dismissed, and the city appealed. The record, therefore, presents the question, whether the city, upon the showing made, is entitled to the relief asked. * * *

The case made by the bill was that the defendant was driving piling in the bed of the Mississippi River near the city wharf, and that such piling would deflect the current and cause obstruction, etc. * * *

The prayer of the complaint is that the defendant, its agents and servants, be forever enjoined from driving piles and constructing its run-ways east of the western water's edge in front of its premises; that it be required to remove the piles already driven, and the run-way so far as constructed; and that the city have such other and further relief in the premises as may be proper.[9]

MR. JUSTICE HARLAN. * * * We are of opinion that the demurrer should have been overruled, and the defendant required to answer. The bill makes a *prima facie* case, not only of the right of the city to bring the suit, but for granting the relief asked. It distinctly avers what the defendant proposes to do, and that averment is accompanied by the general charge or statement that the driving of the piles in the bed of the river,

[8] For a collection of the cases, see Newton v. Grubbs, 48 L. R. A. (N. S.) 355, (1913), annotated.

[9] Statement condensed and part of the opinion omitted.

and the construction of the run-way, will not only cause a diversion of the river from its natural course, but will throw it east of its natural location, from along the river-bank north and south of the proposed run-way and piling, creating in front of the city's improved wharf a deposit of mud and sediment, and rendering it impossible for boats and vessels engaged in the navigation of the Mississippi River to approach or land at the improved wharf north and south of defendant's premises. This is not, as ruled by the Circuit Court, merely the expression of an opinion or apprehension upon the part of the city, but a sufficiently certain, though general, statement of the essential ultimate facts upon which the complainant rests its claim for relief. It was not necessary, in such a case, to aver all the minute circumstances which may be proven in support of the general statement or charge in the bill. While the allegations might have been more extended, without departing from correct rules of pleading, they distinctly apprise the defense of the precise case it is required to meet. There are some cases in which the same decisive and categorical certainty is required in a bill in equity as in a declaration at common law. Cooper, Eq. Pl. 5. But, in most cases, general certainty is sufficient in pleadings in equity. Story, Eq. Pl. sects. 252, 253. Let the case go back for preparation and hearing upon the merits. If it should be again brought here, we may find it necessary to discuss the numerous authorities cited by counsel. In its present condition, we do not deem it wise to say more than we have in this opinion.

The decree will be reversed, with directions to overrule the demurrer and for further proceedings according to law, and it is,

So ordered.

McHENRY v. JEWETT.

Court of Appeals of New York, 1882. 90 N. Y. 58.

Appeal from order of the General Term of the Supreme Court, in the first judicial department, made Feb. 3, 1882, which affirmed an order of general term, granting a preliminary injunction herein. (Reported below, 26 Hun 453.)[10]

[10] Statement condensed and part of the opinion omitted.

ANDREWS, Ch. J. The complaint shows that the plaintiff is pledgor of shares of railroad stock transferred on the books of the company to the defendant as trustee for the pledgee, and the action is brought to restrain the defendant from voting upon the shares at the meetings of stockholders, which it is alleged he has heretofore done, and claims the right to do in the future by reason of his title and right as trustee of the stock. The order from which this appeal is taken, granted a temporary injunction restraining the defendant, *pendente lite*, from voting on the shares. We think the injunction was improperly allowed, for the reason that it does not appear from the complaint that the plaintiff is entitled to the final relief for which the action is brought, and in such case a temporary injunction is unauthorized. (Code, sec. 603.) It is claimed on the part of the plaintiff that within the general rule that the pledgee has no right to use the thing pledged, the defendant is not entitled to vote upon the shares, which, it is insisted, is a use of the shares in violation of this rule. On the other hand the defendant claims that the voting power passes to the pledgee of corporate shares transferred on the books of the corporation to the pledgee, as incident to the pledge, and according to the presumed intention of the parties. Without considering this question, but conceding the plaintiff's claim, it does not follow that he is entitled to an injunction restraining the defendant from voting on the shares. It is not sufficient to authorize the remedy by injunction, that a violation of a naked legal right of property is threatened. There must be some special ground of jurisdiction, and where an injunction is the final relief sought, facts which entitle the plaintiff to this remedy, must be averred in the complaint, and established on the hearing. The complaint in this case is bare of any facts authorizing final relief by injunction. It is true that it is alleged that the defendant by the use of the shares, has been enabled to a great extent to control the management of the corporation in the interest of the New York, Lake Erie and Great Western Railway Company, with little or no regard to the best interests of the company issuing the shares. But there are no facts supporting this allegation, nor is it averred that the interests of the latter company have been prejudiced, or that the value of the shares has been impaired by the acts of the defendant. So also it is alleged that it is greatly against the plaintiff's interest as a shareholder, to

permit the defendant to vote upon the shares, and that the plaintiff will suffer great and irreparable injury, if the defendant is permitted to do so. But no facts justifying these conclusions, are stated, and the mere allegation of serious or irreparable injury, apprehended or threatened, not supported by facts or circumstances tending to justify it, is clearly insufficient. Neither injury to the plaintiff's property, inadequacy of the legal remedy, or any pressing or serious emergency, or danger of loss, or other special ground of jurisdiction, is shown by the complaint. The complaint, therefore, does not show that the plaintiff is entitled to final relief by injunction. (Corporation etc. v. Mapes, 6 Johns. Ch. 46; New York Printing, etc. Establishment v. Fitch, 1 Paige 98; High on Injunctions, §§ 22, 34, 35, and cases cited.) The preliminary injunction was granted upon the complaint, and an affidavit verifying the statements therein, without stating any additional facts. It is doubtless sufficient that a probable or *prima facie* case be made, to justify the granting of an injunction, *pendente lite*, but where, as in this case, it clearly appears that the complaint shows no cause of action, then a preliminary injunction is unauthorized, and the granting of it is error in law, which may be reviewed by this court, on appeal. (Code, § 190, sub. 2; Allen v. Meyer, 73 N. Y. 1; Wright v. Brown, 67 id. 1; Collins v. Collins, 71 id. 270; Paul v. Munger, 47 id. 469.)

The order of the general and special terms should therefore be reversed, with costs.

NEWHAM v. KENTON.

Supreme Court of Missouri, 1883. 79 Mo. 382.

Philips, C. This is a bill in equity. The petition states that plaintiffs are husband and wife; that the wife contracted with the defendant Kenton, to the effect that, as her agent and trustee, he would purchase certain described real estate in the town of Norborne, in Carroll county; that she furnished the money, and the title was to be taken in the name of the defendant, and immediately thereafter he should convey to her; that the money was accordingly furnished, the purchase made by defendant and

the title conveyed to him by the vendor. The petition then averred that soon after said purchase the plaintiff, with the consent of defendant, entered into the possession and enjoyment of the premises, and had ever since so held the same, making large and lasting improvements thereon, such as erecting a house, etc., at the outlay of about $1,000. It is averred that the defendant, though often requested thereto, has wholly failed, refused and neglected to make conveyance to the plaintiff Margaret, as he had agreed to do, and as in equity, etc., he was bound to do. The prayer of the petition is for a decree requiring the defendant to execute to her a good and sufficient deed vesting in her the right and title so acquired by defendant and for proper relief. The answer is a general denial.

The bill of exceptions recites that: "The plaintiffs, to sustain the issues on their part, offered evidence tending to prove the facts set forth in the petition. The defendant, to sustain the issues upon his part, offered evidence to sustain the allegations pleaded in his said answer. This was all the evidence offered."

Upon this state of the case the court rendered the following decree:

"Now at this day come the parties, by attorneys and in person, and each party being ready for trial on the pleadings, and the court, after hearing the testimony for plaintiffs and defendant, and the argument of counsel, finds the facts to be as follows: That on or about the 17th day of January, 1876, the defendant, under and by virtue of a verbal contract, entered into between him and the plaintiff Margaret P. Newham, purchased of one M. C. Huff and wife the real estate described in the petition for and on account of the plaintiff at and for the sum of $230; that by the contract and agreement between the said M. P. Newham and defendant, the deed to said real estate was made to defendant as trustee for the plaintiff, and that said deed has been duly made and recorded in Carroll county, but that said deed does not express said trust; that shortly after said purchase, as aforesaid, a further contract and agreement was made and entered into between plaintiff M. P. Newham and the defendant to this effect: That plaintiff, M. P. Newham and the defendant would erect and build a two story frame storehouse, of the kind and character mentioned in the petition, on said lot; that each party was to bear half of the cost of the building and the defendant to pay one-half of the purchase

money for said lot, and each to be and become equal owners of said house and lot. The plaintiff, M. P. Newham, in the summer and fall of 1876, built and erected said storehouse at a cost of $800; that defendant Kenton furnished labor and material for said building to the amount of $100 only; that plaintiff has held and occupied said building from some time in the fall of 1876 up to the present time; that defendant has failed and refused to carry out said contract either by executing a deed to plaintiff for an undivided half of said lot or by paying his half of the balance of the cost of said building; and that the balance due from defendant to plaintiff M. P. Newham on half the cost of lot and building, after a full settlement of lot and house transaction, is the sum of $339 up to date. It is, therefore, ordered, adjudged and decreed by the court that the said defendant, Thomas Kenton, execute and deliver to plaintiff a good and sufficient deed conveying to said plaintiff, Margaret P. Newham, an undivided one-half of said real estate, to-wit: Twenty-five feet off the south end of lots numbered 9, 10, 11 and 12, in block number 16, in the town of Norborne, Carroll county, Missouri, and that, in default of the execution of said deed, all the right and title of the defendant, Thomas Kenton, in and to said undivided one-half of said real estate be divested, and vested in plaintiff, Margaret P. Newham. And it is further ordered and adjudged that plaintiff, M. P. Newham, have and recover of the defendant, Thomas Kenton, judgment for the sum of $339, together with the costs of this suit, which are taxed at the sum of $———, and that execution issue therefor."

From this decree, after an ineffectual motion for a new trial and in arrest, the defendant has appealed. The question to be decided is, as to the propriety and right of this decree.

It was ever the rule in equity to set out with particularity and the utmost circumspection as to truth, the facts forming the gravamen of the complaint. The bill being addressed to "the forum of conscience," the whole facts should be disclosed that the chancellor might *ex æquo et bono* make decree. The code of practice applicable alike to actions at law and in equity requires "a plain and concise statement of facts constituting the cause of action." The facts thus stated constitute the cause of action and none other. It is a great misapprehension to suppose that one cause of action can be stated in a bill in equity, and by some sort of comprehensive flexibility of chancery jurisdiction relief

can be administered growing out of a state of facts not embraced within the facts pleaded.

The rule that under the general prayer for relief a party may have any relief to which he may show himself entitled, is limited to relief founded on and consistent with the facts set out in the bill, and not such as may be proven at the hearing. McNair v. Biddle, 8 Mo. 257; Wilkin v. Wilkin, 1 John. Ch. 111. So Napton, J., in Mead v. Knox, 12 Mo. 287, said: "It is not denied that a court may grant, under the prayer for general relief, a relief different from the specific relief sought; but the decree must be warranted by the allegations and proofs."[1]

Now, what was the issue tendered by the petition and answer in the case at bar? It was simply and singly whether the plaintiff furnished the purchase money for the lot in question under the arrangement alleged, that defendant should receive the title in trust, and whether he had violated his obligation in that respect to convey to plaintiff. The evidence offered, so recites the bill of exceptions, tended to maintain the issues respectively made. And yet on this state of the pleadings and proofs the court made the decree herein quoted. The decree is based on a new and supplemental contract not embraced nor in the remotest degree referred to in the petition. Such a decree cannot be defended either on authority or principle. In principle it is little, if at all, distinguishable from White v. Rush, 58 Mo. 105, which was an action of ejectment. The answer put in issue the validity of the title under which plaintiff claimed, because there was no notice of the sale under the deed of trust through which the title came. Issue was taken on this new matter. The court was not content with finding the issues for defendant, but went further and adjusted the equities between the parties touching taxes, etc., which had accrued on the land, and rendered judgment for them. This court held there was nothing in the pleadings justifying the judgment, and it was, therefore, error.

How the evidence, on which the decree under review purports to be based, got before the court, is not apparent. It was not competent under the general denial for the defendant to introduce it. It was not an issue within the allegations of the peti-

[1] For the rule that in an equitable action the plaintiff on failure to prove the equitable cause of action, cannot recover on a legal liability disclosed by the proof, see Jackson v. Strong, 222 N. Y. 149, ante, p. 98.

tion; and as it was predicated on a state of facts supervenient, they constituted new matter which the defendant could avail himself of only by pleading them specifically in the answer. Greenway v. James, 34 Mo. 328; Northrup v. Miss. V. Ins. Co., 47 Mo. 443, 444. If they were developed in the progress of the trial, and either party wished to avail himself of them, an application should have been made to the court for leave to amend. To the bill thus amended the defendant would have the right to plead, and quite possibly other and important questions of law might arise thereon.

Respondents' counsel suggest that the appellant ought not to complain of the error, as under the decree he obtains a half interest in the lot and improvements. But the court, whilst leaving in him an undivided interest in the property, went further, and rendered a judgment *in personam*[2] against him for $339. In other words, under a petition to impress the legal title to this property in defendant with a trust and to divest the legal title and vest it in the *cestui que trust*, the court, against his prayer and will, decreed that defendant have half the title, but required him to pay plaintiff a money consideration therefor recoverable from his estate generally. This is a marked exhibition of the expansive powers of a court of equity; and I fear would be a dangerous precedent to establish. It would certainly be a case of "first impression," which would evince some unjudicial temerity to venture.

The judgment of the circuit court is reversed and the cause is remanded. All concur.

2 See Merry Realty Co. v. Shamokin Co., 230 N. Y. 316, ante p. 101, where in a suit to set aside an exchange of lands, the trial court entered a decree for money damages.

SECTION 2. THE DEMAND FOR JUDGMENT.

PENSENNEAU v. PENSENNEAU.

Supreme Court of Missouri, 1855. 22 Mo. 27.

This was an action in the nature of a suit in chancery, brought by the plaintiff, widow of Laurent Pensenneau, against his heirs to establish and enforce a trust in certain tracts of land. A decree was entered for the plaintiff from which defendants appealed.[1]

SCOTT, J.: Elizabeth Pensenneau, the plaintiff, claims that a trust results to her in the land in controversy, because it was an inheritance derived from her father; and her husband, in making a partition with her co-heirs, took a deed for her share in his own name, by which he clothed himself with a trust as to it; and now that he is dead, that she is entitled to have it executed by a conveyance to her of the title in fee simple.

If it were conceded that the law is as assumed by the plaintiff in relation to a resulting trust in her favor, yet a difficulty arises from the fact that the deed in which she joined with her husband in making partition with her co-heirs, was not executed by her in such a way as to pass her interest in the inheritance derived from her father so that she is now in the same situation she would have been had no partition been made. Her husband had a life estate in her land, and, as the matter stands, that estate was the sole consideration which was given for the land, which he acquired by the partition among the co-heirs of his wife, the plaintiff. Elizabeth Pensenneau, the complainant, not having acknowledged the deed in such manner as to pass the estate she had in the land, she now stands as though the partition had not been made, and is at liberty to assert her rights, freed from all embarrassments, as far as appears from the record, created by her husband's deed to her co-heirs. * * *

We are embarrassed in relation to that part of the petition which asks for a partition of the premises as alternative relief to that sought by the case as stated. We do not know on what principle it was founded. Is it to be sustained by the provision contained in the third section of the 17th article of the present practice act, which says: "The court may grant any relief con-

1 Statement condensed and part of the opinion omitted.

sistent with the case made by the complainant, and embraced within the issue." What is the meaning of this provision? Can it be that the plaintiff may, in his petition, ask that, if he fails to make out his case, as stated, that then the court may from the facts, as they turn out, try another and a different action, and give the party the alternative relief sought? Can a plaintiff say the facts of his case are one way, and ask the relief to which they entitle him, and then require the court, if he should on the trial fail to prove his case, to try another cause of action, and ascertain whether he is not entitled to other relief? Here is a petition to enforce a trust. The facts are stated with an eye to that relief. Now, on what principle can the plaintiff ask that, if he is mistaken in the facts, as stated, that then his case may be turned into a petition for partition. The plaintiff must ascertain the facts of his case before he brings his suit. He must state them in a way to entitle him to the relief he seeks. If, on the trial, it turns out that he was mistaken as to the facts of his case, the third section of the 11th article of the practice act affords him a remedy.[2] We understand the clause above cited to mean, that, if on the facts as stated, the plaintiff is entitled to relief of two or more kinds, and he asks for only one kind, yet failing to obtain that, he may have any other relief to which his case, as made, entitles him.[3] He cannot ask in his petition that, if he should be mistaken as to its remedy and fails to obtain the relief he seeks, then that another and a different cause of action may be tried. For the purposes of his action, he must assume that the facts are one way and asks the appropriate relief. He must rely on the facts as stated; if he is mistaken, then the third section of the 11th article of the practice act prescribes a remedy which he must ask from the court, and not come here and object for the first time that it was not allowed him. (Robinson v. Rice, 20 Mo. 229.)

The alternative relief here sought is founded on the assumption that the cause of action is wholly misconceived, and is entirely inconsistent with and foreign to the case as stated in the

[2] This section provided for an amendment of the pleadings on proper terms in case of variance.

[3] For cases where the wrong relief was demanded, see Emery v. Pease, 20 N. Y. 62, ante, p. 82; Barlow v. Scott, 24 N. Y. 40, ante p. 85.

petition Moreover, the necessary parties were not before the court in order to make a partition of the premises.

The difficulty in this case grows out of the omission or unwillingness of the plaintiff to determine on what grounds she will stand. She must either abide by the partition or disclaim it. If she insists that there was a binding partition, let her make a deed confirming it, the only effectual mode by which it can be done. Then she will be in a position to claim an enforcement of the trust, if there is any. If she is unwilling to do this, then let her declare the nullity of the deed of partition, growing out of the imperfect mode of executing it. Failing to do one or the other of these things, she will not be permitted to litigate her rights, without determining what they are, before she institutes her suit. The judgment is reversed, and the bill dismissed without prejudice.

LANE v. GLUCKAUF.

Supreme Court of California, 1865. 28 Cal. 288.

This was an action on a contract or promissory note for $2,843.00 payable six months after date in gold coin with interest, etc.

After setting out the contract, the complaint avers that the same has been assigned by the payee thereof to the plaintiff, and that there is due thereon a certain sum, to wit: two thousand eight hundred and fifty-six dollars and sixty-two cents in gold coin, or a certain other sum in legal tender notes, to be ascertained by adding to the former the difference in value between gold and legal tender notes in the San Francisco market, adding that at the date of the complaint the latter were worth in that market only fifty cents on the dollar in gold coin.

The complaint concludes with a prayer for a judgment for the sum of two thousand eight hundred and fifty-six dollars and sixty-two cents in gold coin of the United States, and in case the same is paid in legal tender notes, that the amount to be paid shall be made equal in value to that sum, to be ascertained at the time of payment from the prices current of the San Francisco market as to the value in gold of said notes.

The defendant first demurred, and then answered, his demurrer having been overruled. The Court found the facts substantially as stated in the complaint, and rendered a judgment in favor of the plaintiff, payable in gold coin, for two thousand nine hundred and forty dollars and twenty-two cents, the amount of principal and interest found due on the contract, with a direction in the judgment that it bear the same rate of interest as the contract. The defendant appealed.[4]

SANDERSON, C. J. * * * It is next claimed that the relief granted exceeds that prayed for in the complaint. This point is based upon the fact that the complaint does not ask for accruing interest, and that the judgment be made to draw interest at the same rate as the contract, whereas the Court allowed accruing interest and framed the judgment so as to make it draw the same rate of interest as the contract. In support of this point Lamping & Co. v. Hyatt et al., *supra* (26 Cal. 99), is cited. But that was a case of default. Where judgment is by default, the Court cannot grant greater relief[5] than is demanded in the complaint; but where there is a trial, the Court may grant any relief consistent with the case made in the complaint and embraced within the issue. (Prac. Act. Sec. 147.) The contract is set out in the complaint, and accruing interest and interest on the judgment are embraced within the issue, notwithstanding they are not included in the prayer.

Judgment affirmed.

COBB v. SMITH.

Supreme Court of Wisconsin, 1868. 23 Wis. 261.

The plaintiffs, in each of these cases, appealed from an order of the circuit court modifying judgment in their favor which had been entered by the clerk. The case will appear from the opinion.

PAINE, J. These three appeals present the same question, and will be disposed of together. The actions were brought for a

[4] Statement condensed and part of the opinion omitted.

[5] See § 1207, N. Y. Code, ante p. 269, note.

flowing of the lands of the plaintiffs by means of a dam erected and maintained by the defendants. The litigation has already been twice before this court. In Newell v. Smith, 15 Wis. 101, it was decided that the act purporting to allow the defendants to flow the lands of others, was unconstitutional, because it did not make any adequate provision for compensation. In Cobb v. Smith, 16 Wis. 661, it was decided that the plaintiffs were not entitled to maintain an equitable suit to prevent the reconstruction of the dam, by reason of their long acquiescence in its maintenance, and in the erection of valuable mills and improvements depending on it for their power. And it was said that for the damage occasioned by the flowing, the plaintiffs had "their common-law remedy."

It seems that the complaints were then amended, so as to turn them into actions for damages, and the cases proceeded to trial, and the plaintiffs had verdicts fixing the amounts of damages respectively. On these verdicts the counsel for the plaintiffs procured the clerk to sign judgments, not only for the damages and costs, but also directing the sheriff to abate the dam. Applications were then made by the defendants to set aside the latter provision in each judgment, upon affidavits showing substantially the same facts as to acquiescence and the erection of valuable mills, etc., that appeared in the equity case above referred to, and also showing that this feature of the judgment was a surprise upon the defendants, who did not suppose that any such relief was sought in the action, and that the attention of the court was not called to it, nor was that of the defendant's counsel, and that the clerk supposed, when he signed the judgments, that they were only judgments for the damages and costs in pursuance of the verdicts. The court below granted the applications, and from those orders these appeals are taken. Its decision was based entirely, as appears from the opinion printed in the case, upon the decision of this court in the equity case above cited. And the counsel for the appellants have shown, that it does not follow from that decision that the action of the court below, now under consideration, was proper. There is undoubtedly a wide difference between a court of equity saying that it will not lend its aid to enforce a legal right, where there are equitable reasons for its refusal, and a court of law saying that a party who recovers in an action at law shall not have such a judgment as the law directs. In the one case the court

has a discretion, based upon those equitable principles and considerations upon which the system of equitable jurisprudence was built up, which entitles it to refuse its peculiar relief in cases where it would cause oppression and injustice. But a court of law has no discretion, resting upon such considerations, to refuse to any party such a judgment as the law provides for, in an action wholly at law. If, therefore, these actions, in the form which they finally assumed, are to be regarded, as the court below intimated, as actions for a private nuisance, within the meaning of section 1, chapter 144, R. S.,[6] then I do not think it would follow that the plaintiffs were not entitled to the judgment there provided for, because this court had decided, that, for the reasons already mentioned, a court of equity would not interfere by injunction to prevent the reconstruction of the dam after it had been carried out by a flood.

But I do not think these actions should be regarded as actions for a private nuisance, within the meaning of that section. The injury complained of is undoubtedly a private nuisance, and the plaintiffs might have proceeded for the purpose of abating the nuisance, if they had seen fit. But they were not bound to do so. They were at liberty to bring their actions merely for the recovery of the damages; and this, I think, is what they have done. It is true, the facts showing the injury to the land are all stated ,and with sufficient particularity to warrant a prayer for the abatement of the dam as a nuisance. But the complaints did not contain any such prayer. No such relief was asked. And under the present system of practice, which requires the plaintiff to state in his complaint the relief he desires, I do not think an action should be regarded as an action to abate a nuisance, unless that relief is demanded in the complaint. This court has decided, in Gillett v. Treganza, 13 Wis. 472, that where the facts stated in a complaint might sustain several different kinds of action, the prayer for relief will be held to determine the character of the action. And the decision is applicable here. The plaintiffs asked only for damages, and that makes the actions, actions for damages only, although, upon the same facts,

[6] The statute authorized a judgment for the abatement of a nuisance in an action triable by jury. Apparently the case of Hellams v. Schwitzer, 24 S. C. 39, ante, p. 190, was brought under a similar statute.

the plaintiffs might have been warranted in asking to abate the dam.

In Abbott's Forms, vol. 1, p. 474, a form for a complaint in such an action is given, where such relief is expressly asked. Such a prayer was in the complaint in Cromwell v. Lowe, 14 Ind. 234, though under their statute the court had a discretion to abate or not. But, without any express authority upon the point, our statute, requiring the plaintiff to state what relief he desires, is amply sufficient to show that, if he does not ask to have the dam abated, the action should not be considered as brought for that purpose.

An action for a private nuisance, within the meaning of the section of the statute above referred to, should be held to be only an action the object of which is to abate the nuisance. That such was its intent is clear from the fact that it provides that, in such cases, the judgment shall be that the nuisance be abated. And, under the present practice, an action cannot be considered of that character unless that relief is demanded in the complaint. Where such relief is sought, it is usually by far the most important object of the suit; and where the plaintiff omits to ask for any such relief, the defendant has a right to assume that the action is not an action for a nuisance within the meaning of that statute.

The justice and propriety of this ruling seem obvious, and this case fully illustrates it. The complaint asking nothing but damages, the defendants were thrown off their guard. They justly concluded that they were not called on to defend against any other claim. They therefore neglected to set forth in their answer such facts as might have entitled them to the affirmative interference of a court of equity to prevent the plaintiffs from enforcing their legal right to the abatement of the nuisance. That upon a sufficiently strong case, a court of equity ought so to interfere, I have no doubt. The same principles which induce it to refuse its own aid to the party whose land is flowed, where he has acquiesced for a long time in the maintenance of the dam, and in the erection of valuable mills and improvements dependent upon it, ought to induce it to give affirmative assistance to the other party, to prevent the assertion of a strict legal right, of trifling value, to the destruction of great and valuable interests that have grown up on the faith of such acquiescence. Undoubtedly the court should attach just conditions to such relief,

and should compel the payment of all that the land-owner ought in equity to receive. But having done this, it should prevent him from asserting his legal right to abate the dam at the expense of such injustice and hardship to others. The cases establishing the principles upon which courts of equity refuse their own aid in such instances, are cited in Sheldon v. Rockwell, 9 Wis. 166. And the following sustain the conclusion that the court would not only refuse its own aid, but would affirmatively interfere to prevent the party from asserting his strict rights at law, in a proper case: Sprague v. Steere, 1 R. I. 259; Trenton Banking Co. v. McKelway, 4 Halt. Ch. 84. The case from Rhode Island was itself a case of the former class, but it refers approvingly to several old cases of the latter. Under the old practice, the mode of obtaining this relief would have been by a separate equitable suit. Under the present, it could be obtained in the suit at law, but only by setting up the facts in the answer, and asking it as affirmative relief. Hence the necessity of indicating in the complaint the kind of relief sought by the plaintiff, that the defendant may have a fair opportunity to defend against it, or any part of it.

I attach no importance to the fact that these complaints contained the old equitable prayer for general relief. Such a prayer is inappropriate to a complaint in an action at law, and does not tend in any manner to supply the place of a specific demand of particular relief, which, if sought, gives character to the whole action.

If these complaints had asked for this relief, and the defendants had neglected to plead and present any equitable defense they might have had, they could not have been relieved on these motions. The judgments would then have been proper. But as they did not ask for it, and as the actions, for that reason, could not fairly be regarded as being brought to abate the nuisance, the defendants were not called on to defend against that relief, and that part of the judgments may well be regarded as a surprise upon them, from which they were entitled to relief on motion.

For these reasons, I think the orders appealed from should be affirmed.[7]

Orders affirmed.

[7] See also O'Brien v. Fitzgerald, 143 N. Y. 377, where the demand for judgment characterized the action as legal, and therefore subject

CORRY v. GAYNOR.

Supreme Court of Ohio, 1871. 21 Ohio St. 277.

The original action was brought by Gaynor against Corry to recover assessments made upon sundry lots for the improvement of a street. The petition sets forth all the facts necessary to show a valid assessment against the lots, giving separately the amount assessed against each. It alleges that the work was duly let to a contractor who has fully completed it, and that the assessments so made have been assigned to the contractor, and by him assigned to Gaynor. The petition also avers that Corry is the owner of the lots; but it does not state who owned them at the date of the assessment, and it asks for a judgment against Corry for the aggregate amount of the several assessments, being $13,781.25, and in default of payment that the respective lots may be sold, each for the amount assessed against it.

The answer denies the legality of the assessment, and also denies that the work has been completed according to contract.

On hearing, the court found that said sum of $13,781.25 was due from Corry, as claimed in the petition, and that the plaintiff had in equity a lien upon the several lots named for the respective amounts so assessed against them. The court thereupon adjudged that Corry should pay said aggregate amount to Gaynor, and in default, that the lots be sold, as upon execution, for the satisfaction thereof.

From this judgment Corry appealed to the district court, where the appeal was dismissed as for want of jurisdiction. To reverse the order of the district court dismissing the appeal, is the object of the present petition in error, the only question being whether the case is one in which the parties had the right of appeal.[8]

WELCH, C. J. We think the court erred in dismissing the appeal. The action was not one in which the parties could demand a jury trial. It was an action under the statute to enforce a lien for assessments upon the lots. The facts stated in

to demurrer for misjoinder of parties, though the facts stated might have supported an equitable action in which case the joinder of parties would have been proper.

[8] From the argument of counsel it appears that an appeal was not available in case of a legal action.

the petition are precisely those which it is necessary to set forth in such an action,—nothing less, nothing more. These facts are the assessments, the performance of the work, and that Corry was, at the time of the commencement of the suit, the owner, or claimed to be the owner, of the lots. The fact that Corry was the owner of these lots at the date of the assessment, is not averred in the petition. Unless he was the owner at that date the statute does not make him liable for the assessment, or authorize an action against him personally. The petition contains a prayer for a personal judgment against Corry, as well as a prayer for the sale of the lots; but there are no facts stated which will justify such a prayer, or warrant the court in rendering such a judgment. The only relief that could properly be granted, upon the facts stated in the petition, was a decree for the enforcement of the lien against the lots. The prayer for personal judgment was mere surplusage and could not give character to the action. It was not an action to recover money, nor was it an action such as is authorized by the act of Feb. 19, 1864 (S. & S. 575), to enforce a lien and also to recover a personal judgment for the amount due. That act can apply only to a case where there is a personal liability for the money due as well as a right to enforce the lien by which it is secured. It is the statement of facts, and not the prayer contained in the petition, which gives character to the action as being one in which the parties are or are not entitled to a jury trial, or an appeal. True, where the facts stated entitle the plaintiff to elect between two remedies, to either of which the facts show him to be entitled, the prayer may determine the character of the action, because it is itself an election. The trouble here, however, is that there are no facts set forth entitling the plaintiff to pray for a personal judgment against Corry. For aught that appears, some one else owned these lots at the time the assessment was made.[9]

Judgment reversed.

9 And so in Easley v. Prewitt, 37 Mo. 361, (1866), where the prayer was for foreclosure of a lien, but the allegations of the complaint simply made a case for a personal judgment.

Compare Faesi v. Goetz, 15 Wis. 231, post, p. 420.

GRAND ISLAND S. & L. ASS'N v. MOORE.

Supreme Court of Nebraska, 1894. 40 Neb. 686.

Appeal from a deficiency judgment rendered in an action to foreclose a mortgage.[10]

IRVINE, C. * * * The second objection is based upon the failure of the petition to pray for a deficiency judgment. The prayer was "for a finding of the amount due on said claim, and for a decree of foreclosure, an order of sale of the said property to satisfy the said claim, and for such other and further relief as is just and equitable." Whether a deficiency judgment can be allowed under a prayer for general relief is a question not free from doubt, and its solution is rendered more difficult, rather than aided, by such authorities as we have been able to find. It would seem that under the general rule that a prayer for general relief permits the allowance of any relief applicable to the case, and not inconsistent with the particular relief demanded, such a prayer would be sufficient to authorize the rendition of a judgment for the deficiency. The courts have, however, exhibited a tendency to depart from this general rule in such cases, but their decisions are largely based upon statutes more or less differing from those of this state. Counsel contend that the case of Brownlee v. Davidson, 28 Neb. 785, 45 N. W. 51, implies that no special prayer for a deficiency judgment is necessary. We cannot see, in that case, any such implication. On the contrary, it does appear, clearly, from that case, that at some stage of the proceedings the plaintiff must ask for a deficiency judgment before error can be predicated upon failure to allow it. This is the only authority cited in the briefs. We have, however, pursued the investigation somewhat further. In Giddings v. Barney, 31 Ohio St. 80,[1] under a similar prayer, the court discussed a statute which it was claimed permitted a mort-

10 Statement condensed and part of the opinion omitted.

1 It appears from this case that under the law of Ohio, a personal judgment for the debt could not be rendered in a purely equitable action to foreclose, but execution might be awarded for a deficiency after the sale of the mortgaged property. In some of the states the practice has grown up to render a personal judgment for the deficiency in the equity case, American Trading Co. v. Gottstein, 123 Ia. 267.

gagee in one action to foreclose his mortgage, and obtain a personal judgment upon the debt. It was held that the personal judgment could not be allowed under a prayer similar to that in the case under consideration, but the court disclaimed the intention to deny the power of awarding execution for a balance due after the property was exhausted. The inference is that such relief could be had. In Foote v. Sprague, 13 Kan. 155, the petition asked for a foreclosure and sale, and that execution should be issued for the balance. A personal judgment was rendered. The supreme court held that, where the prayer was no more defective than in that case, it might be amended at any time, and, upon petition in error, would be considered as amended. In Wisconsin the statute permits a deficiency judgment only where it is demanded. In Olinger v. Liddle, 55 Wis. 621, 13 N. W. 703, a prayer for execution for any balance was held sufficient to meet the requirement of the statute. In Kentucky, under a prayer for foreclosure and general relief, it was held, in Hansford v. Holdman, 14 Bush. 210, that the rendition of a deficiency judgment was erroneous, where the defendant made no defense to the action. But this was because a statute provided that if no defense be made the plaintiff cannot have judgment for any relief not specifically demanded. This principle would seem quite clear. In New York the statute is similar to that in Kentucky, and the cases in that state usually cited as holding that a special prayer is necessary are based upon the statute, and intimate that where a defense is made the rule would be different. Simonson v. Blake, 20 How. Pr. 484; Peck v. Railway Co., 85 N. Y. 246. The result of these cases seems about as follows: In Ohio, we have a *dictum* that the general prayer is sufficient; in Wisconsin, a liberal construction given to a special prayer, to make it conform with the statute; in Kansas, an implication that a special prayer is necessary, but defective prayer treated as amended so as to supply the defect; in New York and Kentucky, an inference that the general prayer is sufficient, where the defendant, by making a defense, has deprived himself of the protection of a statute demanding a different rule. We have not in this state any statute similar to those of Wisconsin, New York, or Kentucky. The protection afforded defendants in default by those statutes is partially given here by section 64 of the Code of Civil Procedure, providing that, in an action for the recovery of money only, there shall be indorsed on the writ the amount

for which judgment will be taken, if the defendant fail to answer, and that, if the defendant fail to appear, judgment shall not be taken for a larger amount, and the costs. In Jones v. Null, 9 Neb. 57, 1 N. W. 867, it was held that a suit to foreclose a mortgage was not an action for the recovery of money only. Still, we are not required to decide what rights the defendant would have, on failure to appear in such a case, if there was no indorsement upon the writ. The record contains neither the process, the answer, nor the decree. If the appearance of defendant was necessary to give the court power to act, it must be presumed that there was such appearance. It would seem, therefore, that the prayer was sufficient to justify the rendition of the deficiency judgment; but, if not, then we are quite clear that it might be amended, with notice to the defendant, so as to ask for the judgment, and the motion for the judgment, especially where it is couched in such language as it was here, should be treated as an amendment. The record shows affirmatively that notice of the motion was served upon the defendant, and that he appeared in response thereto. The amendment was also in time. It came before the judgment was rendered, and no attempt was made to take advantage of any finding affecting the right to the judgment which may have been contained in the original decree. The right to the judgment was tried upon its merits, subsequent to the motion, and after defendant's appearance to the motion. * * *

Judgment affirmed.

SMITH v. SMITH.

Supreme Court of Kansas, 1903. 67 Kan. 841.

Per Curiam. This was an action by the defendant in error upon a petition setting out facts which would warrant the entering of a decree for a divorce and alimony, or for alimony alone, against the plaintiff in error, then her husband. A decree for both divorce and alimony was entered. The most meritorious question raised upon the petition in error is whether under a petition whose allegations would authorize a divorce, but the

prayer of which is only that alimony be allowed, a decree of divorce should be granted. It is well settled in this state that the prayer of the petition forms no part of it, and that relief may be granted in accordance with the facts stated in the petition rather than pursuant to its prayer. Smith v. Kimball, 36 Kan. 474, 13 Pac. 801; Walker v. Fleming, 37 Kan. 171, 14 Pac. 470. But it is here insisted, where the facts pleaded warrant more than one kind of relief, that plaintiff should have only such relief as he prays for; that otherwise defendant might be misled in the presentation of his evidence, not knowing the ultimate and true purpose of plaintiff in the prosecution of the action. No effort was made by the defendant to require the plaintiff to state how much of relief she was desiring. He knew from the allegations of the petition that she might obtain a divorce. He chose to go into the trial without subsequently requesting a declaration as to the extent of the relief which she desired. Besides this, we think it fairly inferable from the record that the defendant was notified that the action was one by which the plaintiff expected to obtain a divorce, and that defendant conducted his case upon that theory.[2]

Considerable space is devoted in the brief of plaintiff in error to a discussion of the evidence and its sufficiency. All of the evidence, with its claimed contradictions, was before the trial court. He deemed it sufficient. We are not in a position to take an opposite view; indeed, we are inclined to the same conclusion. * * *

Judgment affirmed.

[2] See also Nathan v. Dierssen, 164 Cal. 607, (1913), where the complaint was treated as in ejectment and for mesne profits, the statute allowing such a combination, though judgment for mesne profits alone was demanded.

SECTION 3. JOINDER OF CAUSES OF ACTION.

1. *Causes That May Be Joined.*[1]

HARRIS v. AVERY.

Supreme Court of Kansas, 1869. 5 Kan. 146.

VALENTINE, J. This action was brought in the court below by Avery, as plaintiff. The petition states two causes of action, —false imprisonment and slander,—and alleges that both arose out of the same transaction. Harris demurred to this petition, on the ground "that it appears on the face of the petition that several causes of action are improperly joined." The district court overruled the demurrer, and this ruling is assigned as error. The petition shows that the two causes of action are founded upon the following facts: Harris met Avery in the City of Fort Scott, and, in the presence of several other persons, called Avery a thief; said he had a stolen horse; took the horse from Avery, and kept the horse for four or five days; arrested Avery, and confined him in the county jail with felons four or five days. We think these facts, as detailed in the petition, constitute only one transaction (Brewer v. Temple, 15 How. Pr. 286); and whether they constitute more than one cause of action, under our code practice, may be questionable.[2] Under the authority we have referred to they would not. But as we have not been asked to decide the latter question, we will pass it over and treat the case as though the facts stated constitute two causes of action.

Section 89 of the Code (Comp. Laws 138), provides "that the plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, when they are included in either one of the following classes: First, the same transaction or transactions connected with the same subject of action." This differs in many respects from the common law rule. At common law, "where the same form of action may be adopted

1 For the provisions of the code on the joinder of several causes of action in the same complaint, see ante, p. 269.

2 As to when more than one cause of action arises, see section on "Splitting and consolidation of demands," ante, p. 3.

for several distinct injuries, the plaintiff may, in general, proceed for all in one action, though the several rights affected were derived from different titles," (1 Chit. Pl. 201; Tidd, Pr. 11); and different forms of action may be united, "where the same plea may be pleaded and the same judgment given on all the counts of the declaration, or whenever the counts are of the same nature, and the same judgment is to be given on them, although the pleas be different." 1 Chit. Pl. 200.

In the action at bar, if Harris had arrested Avery on a warrant, which Harris had maliciously and without probable cause obtained from a court of competent jurisdiction, and had also converted the horse to his own use, then at common law Avery would have had three distinct causes of action, which he could unite in one suit: First, an action for the false imprisonment or malicious prosecution; second, an action of slander for the words spoken; and, third, an action of trover for the conversion of the horse. These may all be united in an action on the case, (1 Chit. Pl. 133, 134, 146; 1 Tidd Pr. 5) trover being a species of case. Avery might, also, at common law unite with these causes of action as many other causes of action as he might have, for malicious prosecution, slander, trover, criminal conversation, nuisance, and other causes of action which may be sued in an action on the case, and although they may each have arisen out of a different transaction, and at a different time, and in a different place. But if Harris arrested Avery without any process—which was the fact in this case—and in an entirely irregular manner, then the two causes of action for false imprisonment and slander could not at common law be united, as the first would have to be sued in an action of trespass and the second in an action on the case, and it would make no difference whether they both arose out of the same transaction or not. Our code has abolished all the common law forms of action, and has established a system for the joinder of actions,—more philosophical, and complete within itself. It follows the rules of equity more closely than it does those of the common law, one object seeming to be to avoid the multiplicity of suits, and to settle in one action, as equity did, as far as practicable, the whole subject matter of a controversy. Hence, the common law on this question is no criterion. It is probably true that the two causes of action for false imprisonment and slander cannot, under our code, be united, unless both arise out of the same trans-

action, one being an injury to the person and the other being an injury to the character; but we do not know of any reason why they should not be united when both do arise out of the same transaction. It is claimed by counsel for the plaintiff in error that the earlier cases under the New York Code are against this view of the case. He refers to Furniss v. Brown, 8 How. Pr. 59, 73; Hulse v. Thompson, 9 How. Pr. 113; Jeroliman v. Cohen, 1 Duer 629. We think it questionable whether these cases sustain the counsel's views; but if they do, the later decisions under the same code are squarely against him. See Brewer v. Temple, 15 How. Pr. 286; Robinson v. Flint, 16 How. Pr. 240. In the latter case the court, as we think, express the true rule. They say "that the plaintiff may unite—First, as many legal causes of action as he pleases arising out of the same transaction; second, as many equitable causes of action as he pleases arising out of the same transaction; third, as many legal and equitable causes of action as he pleases arising out of the same transaction; fourth, as many causes of action as he pleases rising out of different transactions connected with the subject of the action."

The order of the district court overruling the demurrer to the petition is affirmed.

WILES v. SUYDAM.

Court of Appeals of New York, 1876. 64 N. Y. 173.

CHURCH, Ch. J.: The ground of demurrer relied upon is that several causes of action are improperly united. The complaint contains but one count composed of a series of allegations, and was doubtless framed upon the theory that there is but one cause of action contained. If, however, the complaint does contain several causes of action, and they are improperly united, the omission to state the causes of action in separate counts properly numbered does not deprive the defendant of the right to demur. (Goldberg v. Utley, 60 N. Y. 427.) The complaint alleges an indebtedness against the Imperishable Stone Block Pavement Company of New York City, which had been prosecuted to judgment and execution; that the defendant

was a "stockholder to the amount of $50,000," but had not paid for the same, and that no certificate had been made and recorded that the capital was paid in. Section 10 of the act authorizing the formation of corporations for manufacturing and other purposes declares that until such certificate is recorded the stockholders shall be liable for the debts of the company to the amount of their stock respectively. The complaint also alleges that at the time the debt was contracted and ever since, the defendant was a trustee of the corporation, and that no report was filed on the 1st day of January, 1873, nor at any time since, and for this neglect the twelfth section of the act aforesaid declares that the trustees shall be liable for all the debts of the corporation then existing, or which may be thereafter created, until such report is filed.

It is insisted by the counsel for the plaintiff that this constitutes but one cause of action, and he argues that the cause of action is to recover the debt upon two grounds of personal liability created by statute. I am unable to concur in this view. The recovery of the debt is the object of the action, but a cause of action must have two factors, the right of the plaintiff and the wrong or obligation of the defendant. These must concur to give a cause of action. The cause of action against the defendant as a stockholder, consists of the debt and the liability created by statute against stockholders when the stock has not been paid in and a certificate of that fact recorded. In effect the statute in such a case withdraws the protection of the corporation from the stockholders, and regards them liable to the extent of the amount of their stock as co-partners. (Corning v. McCullough, 1 N. Y. 47.) The allegations in the complaint are sufficient to establish a perfect cause of action against the defendant as a stockholder primarily liable for the debts to the amount of his stock. The allegations against the defendant as trustee also constitute a distinct and perfect cause of action, but of an entirely different character. Here the liability is created by statute and is in the nature of a penalty imposed for neglect of a duty in not filing a report showing the situation of the company. The object of the action is the same, viz., the collection of the debt; but the liability and the grounds of it are entirely distinct and unlike. That there are two causes of action in this complaint seems too clear to require much argument. The more difficult question is, whether they may be

united in the same complaint. The first cause of action against the defendant as a stockholder is an action on contract. The six years' statute of limitation applies. (1 N. Y., supra.) The defendant is entitled to contribution. (3 Hill 188.) But in respect to the action against defendant as trustee, this court held in Merchants' Bank v. Bliss (35 N. Y. 412), that the three years' statute of limitations applied under the following provision of the code: "An action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved." (§ 92.)

With this decision before us, which we do not feel at liberty to overrule, this cause of action must be regarded as an *action upon a statute for a penalty or forfeiture.* The liability is far more extensive than that of the stockholder; it is for all debts, while the former is limited to the amount of the stock. The defendant would not be entitled to contribution except by statute (Laws of 1871, p. 1435), and contributions would be from different persons than in the other case. It is claimed also that execution against the person might issue and this would seem to follow from the decision in 12 New York (*supra*) but we do not deem it necessary to pass upon that question. If these actions may be united it must be by virtue of the first subdivision of section 167 of the code. From the nature of the two actions they do not come under either of the other subdivisions. The first subdivision reads as follows: "The plaintiff may unite in the same complaint several causes of action whether they be such as have been heretofore denominated legal or equitable, or both, when they all arise out of: 1st. The same transaction or transactions connected with the same subject of action." This language is very general and very indefinite. I have examined the various authorities upon this clause, and I am satisfied that it is impracticable to lay down a general rule which will serve as an accurate guide for future cases. It is safer for courts to pass upon the question as each case is presented. To invent a rule for determining what the "same transaction" means, and when a cause of action shall be deemed to "arise out of it," and what the same "subject of action means," and when transactions are to be deemed connected with it, has taxed the ingenuity of many learned judges, and I do not deem it necessary to make the effort to find a solution to these questions. An interesting chapter on this clause is contained in a recent work

by John M. Pomeroy, on "Remedies and Remedial Rights" (p. 496), which contains a review of all the authorities, and a critical analysis of the language with definitions and suggestions which will be useful in determining particular cases. Judge Comstock says of this clause: "Its language is I think well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretation which shall be found most convenient and best calculated to promote the ends of justice." (17 N. Y. 592.) There is certainly ample scope for construction, but it is sometimes difficult to determine what interpretation will best promote the ends of justice. It is probable that the primary purpose of this provision was intended to apply to equitable actions, which frequently embrace many complicated acts and transactions relating to the subject matter of the action, which it would be desirable to settle in a single controversy. The clause was not intended to overturn all distinctions in actions and rules of pleading, and this court has held that an action of trespass, in breaking into a house and opening a trunk, could not be joined with an action on a covenant in a lease for quiet enjoyment, although the act which rendered the defendant liable in both actions was the same. (56 N. Y. 332.) In this case it is attempted to unite an action on a statute for a penalty with an action on contract. The nature of the two actions are essentially different, although the object to be attained is the same. The facts to establish the liability are entirely unlike. The measure of liability is different; the defenses are different. The rights of the defendant may be seriously prejudiced. Suppose a general verdict is obtained, from whom would the defendant seek contribution, from his co-trustees or from his co-stockholders? Can it be said that these causes of action arose out of the same transaction? If so, what was the transaction? Was it the formation of the company? That created no liability nor cause of action. Was it the debt of the plaintiff? That created no liability against the trustees, nor does such liability arise out of it. Was it the failure to file a certificate that the stock was not paid in? If so, there is no connection between that and the transaction which created the liability against the defendant as trustee. An omission to record a certificate that the stock was paid is not, in any sense, the same transaction as the neglect of trustees to file a report of the financial condition of the company. Without attempting to define

the terms of the last clause, I do not think that there is any such connection between the transactions, out of which the causes of action arose in this case, and the "subject of action" as to justify uniting of the two causes of action.

The causes of action are independent of each other; the "transactions" are different, and there is no legal affinity between them. The language of the last clause is more applicable to equitable actions where the controversy is in respect to specific property, real or personal. It is difficult to define in this case the "subject of action." The object of the action is to recover the debt; but is the debt the subject of action? In some sense it, perhaps, may be so regarded; while in another the subject of action may be regarded the penalty or forfeiture. If the former, there is no natural connection between it and the transaction creating the liability. If the latter, it has no connection with the transaction against the defendant as a stockholder. The language of the last clause, it seems to me, has no application to this case, and I am confident it was never intended by it to force a connection between such distinct and independent things. It may be convenient for the plaintiff to combine the two causes of action, but, looking at the rights of both parties and the rules of law, we cannot think that the code was designed to authorize their union in one complaint.

The judgment must be reversed and the demurrer sustained, with leave to the plaintiff to amend within the usual time.

Judgment accordingly.

DEWOLF v. ABRAHAM.

Court of Appeals of New York, 1896. 151 N. Y. 186.

BARTLETT, J. The plaintiff sued the defendants, merchants in the city of Brooklyn, for slander, alleging that, at their place of business, and in the presence and hearing of a large number of people, the defendants, through their lawful agents, charged plaintiff with theft, in that she had stolen from them a certain ring. The plaintiff's counsel in opening the case to the jury, stated that the alleged slander was not uttered by the defendants, or either of them, but by a clerk or salesman in their

employ, that plaintiff, at the time of the slander was falsely imprisoned by a detective of defendant's; and that the plaintiff sought to recover damages for the false imprisonment and for slander. Thereupon the counsel for defendants moved, upon the complaint and the opening, for a dismissal, upon the ground that the defendants were not liable for the slander of their clerks, and that the complaint was solely for slander. This motion was denied, and the plaintiff was allowed to withdraw a juror for the purpose of applying to the special term for leave to amend her complaint, so as to allege a cause of action for false imprisonment against the defendants. A motion was accordingly made at special term, and the justice presiding held that the proposed amended complaint contained a union of the causes of action for slander and false imprisonment, and denied the motion. On appeal, the appellate division reversed the order of the special term, and allowed the amendment, holding that "injury at the same time to the person by physical violence and to the character by the language may well be regarded as parts of a single tort." The question of law is certified to us, "whether, under all the circumstances of the case, the plaintiff should have been allowed to amend her complaint for slander by adding thereto the statement of a cause of action for false imprisonment."

We are unable to agree with the conclusion, reached by the learned appellate division, that injury at the same time to the person by physical violence and to the character by language may well be regarded as parts of a single tort. We think to so hold is to ignore a distinction that exists in all jurisdictions where the common law is administered. It is not necessary, however, to examine precedents, as the code of civil procedure (section 484) is decisive of this appeal. This section provides that the plaintiff may unite in the same complaint two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as set forth in nine subdivisions. The second, third and ninth are the only ones material to this controversy. They read as follows: "(2) For personal injuries, except libel, slander, criminal conversation or seduction. (3) For libel or slander. * * * (9) Upon claims arising out of the same transaction or transactions connected with the same subject of action and not included within one of the foregoing subdivisions of this

section." The section then provides generally "that it must appear upon the face of the complaint that all the causes of action so united belong to one of the foregoing subdivisions of this section." It thus appears that the legislature has indicated with great clearness and particularity the causes of action that may be united in the same complaint. The test is very simple, as all causes of action united must belong to the same subdivision of the section we are considering. False imprisonment is an injury to the person, and is embraced within subdivision 2, while slander is in express terms excluded therefrom, and placed in subdivision 3. The plaintiff's case is not aided by subdivision 9 of the section, which provides for uniting causes of action upon claims arising out of the same transaction. It does not follow that two causes of action, originating at the same time, arose, as a matter of law, out of the same transaction, or are proved by the same evidence. Anderson v. Hill, 53 Barb. 245, 246. In the case last cited the general term of the supreme court held that causes of action for assault and battery and slander could not be united in the same complaint. Mr. Pomeroy, in his work on Code Remedies (section 474), in commenting on that case, says: "Two events happened simultaneously, the beating and the defamation, but neither was a 'transaction,' in any proper sense of the word. The wrong which formed a part of one transaction was the beating; that which formed a part of the other was the malicious speaking. The plaintiff's primary rights which previously existed were broken by two independent and existing wrongs. The only common point between the causes of action was one of time, but this unity of time was certainly not a 'transaction.'" The separate and distinct nature of the causes of action of false imprisonment and slander are apparent when we apply the test, under the circumstances of the case at bar, whether the same evidence would prove the plaintiff's case in the two actions. It is obvious that it would not. In the action for false imprisonment, plaintiff must show an unlawful arrest and detention. In the action for slander, the proof would be the uttering of the slander in the presence of others, its falsity, if justified, and extrinsic evidence of malice, if any existed. The measure and proof of damages in the two causes of action would be entirely different. The order appealed from should be reversed, with costs, the order of the special term should be

affirmed, and the question of law certified to us is answered in the negative. All concur.

Ordered accordingly.

CRAFT REFRIGERATING CO. v. QUINNEPIAC BREWING CO.

Supreme Court of Connecticut, 1893. 63 Conn. 551.

Action to recover damages upon a complaint containing but one count sounding in contract and also in tort; brought to the Superior Court in New Haven County and tried to the jury before George W. Wheeler, Jr.

The complaint alleged a purchase by the defendant of the plaintiff of two refrigerating machines for the agreed price of $13,700, and their delivery by the plaintiff; that afterwards the defendant wrongfully claimed that said machines were not of the quality and capacity contracted for, and notified the plaintiff to take them away; that the plaintiff, thereupon, while claiming that it had fulfilled the terms of the contract, nevertheless agreed to take the machines back, if it could take them immediately; that it thereupon sent for them; but the defendant forcibly prevented their removal and continued to use the machines as its own property and converted them to its own use. The defendant filed a special answer and counterclaim alleging a breach of the contract on the part of the plaintiff to furnish machines of a specified capacity, and damages to the defendant resulting therefrom. * * *

The plaintiff claimed that the complaint stated all the elements of a causeof action in tort and one of contract; that the Practice Act merely requires the facts to be set out, as they were in the present complaint, and that even if those facts are combined in one count, if no preliminary objection is made, the plaintiff is entitled to proceed and recover on either theory.

The court ruled that the two causes of action could not be stated in one count, and that the plaintiff must elect upon which cause of action it would stand. The plaintiff declined to elect and the court rendered a judgment dismissing the complaint

and allowing costs to the defendant. From this judgment the plaintiff appealed.[3]

BALDWIN, J. Complaints, under the practice act, are to "contain a statement of the facts constituting the cause of action." Gen. St. § 872. This is to be "a plain and concise statement of the material facts on which the pleader relies." Id. § 880. "Acts and contracts may be stated according to their legal effect." (Practice Book, p. 14, rule 3, § 1), and "the plaintiff may claim alternative relief, based upon an alternative construction of his cause of action." (Id. p. 13, rule 2, § 9.) Several causes of action may be united in the same complaint if all are "upon claims, whether in contract or tort, or both, arising out of the same transaction or transactions connected with the same subject of action; but they must be separately stated," and "if it appear to the court that they cannot all be conveniently heard together, the court may order separate trials of any such causes of action, or may direct that any one or more of them be expunged from the complaint." Gen. St. § 878. "Transactions connected with the same subject of action may include any transactions which grow out of the subject matter in regard to which the controversy has arisen; as, for instance, the failure of a bailee to use the goods bailed for the purpose agreed, and also an injury to them by his fault and neglect." Practice Book, p. 15, rule 3, § 7. Where separate and distinct causes of action (as distinguished from separate and distinct claims for relief, founded on the same cause of action or transaction) are joined, "the complaint is to be divided into separate counts." Id. p. 12, rule 2, § 4. Any exception for misjoinder of causes of action, whether in the same or separate counts, must be taken by demurrer, and if not so taken, will be deemed to be waived. Id. p. 17, rule 4, § 13. These various statutory provisions and rules of court are all designed to enable the plaintiff to state his grievance to the court, untrammeled by artificial forms of pleading, and regardless of most of the ancient distinctions of procedure as to law and equity or contract and tort. There is no attempt to bring the parties to issue upon some "single, certain and material point." Each paragraph of the complaint is to contain "as nearly as may be a separate allegation" (Gen. St. § 880) and it is declared that, "the denial of any material

3 Statement condensed and part of the opinion omitted.

allegation shall constitute an issue of fact" (Practice Book, p. 17, rule 4, § 12.) If, in any case, so many of these issues are formed that the court fears the jury cannot dispose of them all at one hearing, it "may order that one or more of the issues joined be tried before the others." Gen. St. § 1032. And, if the issues made up by the parties are indefinite or indecisive, the court may direct them "to prepare other issues, and such issues shall, if the parties differ, be settled by the court." Id. § 880.

The plaintiff's complaint sets forth two causes of action, stating them in separate paragraphs, but not in separate counts. One cause of action is for the breach of a contract to take, and pay for, two refrigerating machines, at an agreed price. The other cause of action is for a conversion of the machines. It was proper to join these different causes of action in one complaint, either if both arose out of the same transaction, or if, while one arose out of one transaction, and the other out of another, both these transactions were "connected with the same subject of action." A transaction is something which has been transacted, that is, acted out to the end. This notion of completed action strongly characterizes the word in the Latin language, from which, through the Normans, we have derived it, although we gain little assistance otherwise from these sources in determining its meaning, since both the Romans and the French have used it mainly as a juridical term in signifying an agreement of parties in the settlement of differences Dig. II. 15, *"De Transactionibus"*; Civil Code of France, art. 2044. As the word is employed in the American codes of pleading and in our own practice act, a "transaction" is something which has taken place, whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered. The transaction between the parties to the present action began when they made the contract for the manufacture and sale of the two machines. Then followed the delivery of the machines, the refusal to accept them, the attempt of the plaintiff to retake them, the forcible prevention of their removal, and the subsequent continuance of their use in the defendant's business. Without taking each and all of these events into consideration, the legal relations of

the parties could not be fully determined. From the delivery of the machines to the commencement of the action, they had remained continuously in the defendant's possession. It had simply dealt with them in a different way at different times. The practice act is to be "favorably and liberally construed as a remedial statute." Practice Book p. 21, rule 9, § 4. It has taken the word "transaction," not out of any legal vocabulary of technical terms, but from the common speech of men. So far as we are aware, it has never been the subject of any exact judicial definition. It is therefore to be construed as men commonly understand it, when applied, as in our practice act it certainly is applied (Gen. St. § 878), to any dealings between the parties resulting in wrongs, without regard to whether the wrong be done by violence, neglect, or breach of contract. It seems to us hardly to be doubted that any ordinary man would consider everything stated in the complaint as properly belonging to a narrative of the whole transaction between the parties, and necessary for the information of one who was to form a judgment as to their respective rights. That a broader meaning should be given to the term "transaction" than it has received in some of the courts of our sister states is plain from the provision in the Practice Book (p. 13, rule 2, § 7) that "where several torts are committed simultaneously against the plaintiff (as a battery accompanied by slanderous words) they may be joined as causes of action arising out of the same transaction, notwithstanding they may belong to different classes of actions." This was the deliberate adoption of a view of the meaning of the word in question which had been previously disapproved in New York, as well as by Judge Bliss, in his treatise on Code Pleading (section 125), though accepted in Kansas. Anderson v. Hill, 53 Barb. 238, 245; Harris v. Avery, 5 Kan. 146. It follows that both causes of action declared on were properly united in one complaint. The same result would also be reached if what we have viewed as one transaction could be regarded as consisting of several transactions, since all would be connected with the same subject of action; that is, the two machines, and the title to them. * * *

Judgment affirmed.[4]

[4] The judgment was affirmed on the ground that no exception had been taken to the order requiring plaintiff to elect.

SCARBOROUGH v. SMITH.

Supreme Court of Kansas, 1877. 18 Kan. 399.

The plaintiff brought this action to recover possession of an undivided half of a tract of land from which his co-tenant had excluded him, and for partition of the premises. The court overruled a demurrer for misjoinder of causes of action, and the defendant appealed.[5]

VALENTINE, J. * * * We suppose the plaintiff sets forth in his petition three causes of action; first, an action in the nature of ejectment, under section 595 of the civil code, for the recovery of his undivided half interest in said real property; second, an action to recover the value of his portion of the rents and profits of said real property; (see Gen. Stat. p. 541, § 22, p. 646, § 83, sub. 6;) and third, and an action for partition of said real property; (see Gen. Stat. 753 to 755, §§ 614 to 629). We do not think that the plaintiff sets forth a cause of action to quiet title or possession, or to remove a cloud therefrom, for he does not show that he is in possession of the property either actually or constructively—a necessary element in that kind of actions; but he does show that others are in the actual possession of the property, denying his right and title to the property, and enjoying the proceeds thereof. * * *

Now if the two causes of action for ejectment and partition, when united, constitute only one enlarged cause of action, then it is entirely unnecessary to inquire in this case what causes of action may be united, or to enquire whether the cause of action for rents and profits may be united with this enlarged cause of action; for on the final determination of this action, in the court below, nothing was allowed the plaintiff for rents and profits. We shall however suppose, for the purposes of this action, that the two causes of action, for ejectment, and for partition, are two separate causes of action. Then can these two causes of action be united in one action? And can they both be united with another cause of action for rents and profits taken from the same real property? That the cause of action for ejectment, and that for rents and profits, may be united in the same

[5] Statement condensed and part of opinion omitted.

action, there can be no question. Section 83 of the code provides, that—

"The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal, or equitable, or both, where they all arise out of either one of the following classes: * * * *Sixth,* Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same." (Gen. Stat. 645, 646.)

The question however still remains, as to whether the cause of action for partition may be united with the other two causes of action. This depends upon another provision of said section 83 of the code. Said section provides that—

"The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal, or equitable, or both, where they all arise out of either one of the following classes: *First,* The same transaction, or transactions connected with the same subject of action."

Now whether these three causes of action may all be united in one action, or rather whether the cause of action for partition may be united with the other two causes of action, depends upon the meaning of the words, "causes of action," "arise out of," "transactions," "connected with," and "subject of action." We shall not attempt to define these words any further than is necessary to apply them to this case. Now in this case we have three causes of action: First, for ejectment—the elements of which are as follows: the plaintiff has a right to the possession and enjoyment of said real property in common with his co-tenant or co-tenants—he one-half, and his co-tenant, or co-tenants the other half—but the defendants deprive him of that right. Second, for rents and profits—the elements of which are as follows: the plaintiff has a right to the use and enjoyment of one-half of the rents and profits of said real property, but the defendants deprive him of that right. Third, for partition —the elements of which are as follows: the plaintiff has a right to the use and enjoyment, if he prefers it, to some specific moiety of said real property, the same to be set off to him in severalty, but the defendants deny and resist such right. These three causes of action are in fact all founded upon, or, in other words, "arise out of," three classes of infringements upon one single right of the plaintiff. These infringements are the

"transactions" out of which the plaintiff's several causes of action arise, and are just such "transactions" as are contemplated in said section 83 of the code; and they consist merely of the acts of the defendants in contravention of the said right of the plaintiff. The word "transactions," as used in said section, probably means, whatever may be done by one person which affects another's rights, and out of which a cause of action may arise. Said single right of the plaintiff in this action, consists in his right to use and enjoy, in the manner he chooses, his said interest in said real property, with all the proceeds and avails thereof. This right is the "subject of action" in this case. It is the basis and foundation of the whole action. Each of the several causes of action depends entirely for its support upon the soundness and validity of this right; and, unless such right can be maintained, this whole action must fail. The phrase, "subject of action," would probably ordinarily have a broader signification than we have given it. It would probably ordinarily mean, as to each cause of action, the entire "subject-matter of the action." But for the purposes of uniting various causes of action it cannot have a broader signification than we have given it. Of course, it does not include the several "transactions" "connected with" it, and out of which the several causes of action arise; for the "subject of action" (the "*same*" subject of action) must be common to all the several causes of action which are united, while the several "transactions" cannot be thus common. Each transaction or class of transactions must ordinarily belong to a different cause of action. And of course, the "subject of action" is not the "cause of action," or the cause of any action, or any cause of action. It is simply one of the elements of each of the several causes of action, uniting and binding them together in one action. The legislature did not commit the folly of enacting, that several "causes of action" may be united when they all arise out of transactions connected with the same "cause of action." But they enacted, that several "causes of action" may be united when they all arise out of transactions connected with the same "*subject* of action." Neither can the "subject of action" be the "object of the action." The "subject of action" must exist prior to the creation of the causes of action which are to be united; for the causes of action are such as "arise out of" transactions "connected with" the "subject of action." But the "object of the

action'' is only brought into existence by the commencement of the action itself, long after both the ''subject of action'' and the ''causes of action'' have had an existence. The ''object of the action'' is the thing sought to be attained by the action. It is the remedy demanded, the relief prayed for, and is no part of the ''subject of action,'' or the ''cause of action.'' The ''subject of action,'' then, not being the whole of the ''subject-matter of the action,'' nor the ''cause of action,'' nor the ''object of the action,'' we think it is just what we heretofore have stated it to be. It is in this case, the original right of the plaintiff to enjoy his said property as he pleases. Now this right being the ''subject of action,'' and the various infringements upon this right being the ''transactions'' out of which the plaintiff's several ''causes of action'' arose, it is clear that all of said ''transactions'' are ''connected with the same subject of action;''[6] and therefore, that all of the said several causes of action may be united in one action. * * *

Judgment affirmed.

MIDLAND TERRA COTTA CO. v. ILLINOIS SURETY CO.

Supreme Court of Wisconsin, 1916. 163 Wis. 190.

Action for the purchase price of material sold and delivered to J. W. Utley, the principal contractor for the construction of a building owned by the Edward Schuster & Co. Inc. The Illinois Surety Company is joined as a defendant because it idemnified the Edward Schuster & Co. Inc., by a bond against any failure of the contractor to duly perform his contract. * * *

Two causes of action are set out in the complaint, one against Utley upon his contract of purchase, and against the Edward Schuster & Co. Inc. upon its express agreement with plaintiff

6 For a most exhaustive and critical discussion of the meaning of the terms ''transaction'' and ''subject of the action'', see opinion by the late Chief Justice Winslow in McArthur v. Moffett, 143 Wis. 564, (1910), which is too long for reprinting. It is pointed out in this case that the term ''subject of the action'' is used in a number of instances in the code in the sense of the res or property involved in the litigation.

to pay for the material furnished if plaintiff would forbear to file a mechanic's lien against the premises, which it forebore to do relying upon such agreement; the other, against Utley upon the same contract of purchase and against the Illinois Surety Company upon its liability on the bond.

The Illinois Surety Company demurred to the complaint on the ground that several causes of action have been improperly united therein for the reason that the causes of action stated in the complaint do not affect all the parties to the action. The court sustained the demurrer and the plaintiff appealed.[7]

Vinje, J. In the case of Concrete S. Co. v. Illinois S. Co., *ante* p. 41, 157 N. W. 543, it was held that the Illinois Surety Company was directly liable to a subcontractor under the provision of its bond set out in the statement of facts. The defendant Edward Schuster & Co. Inc. is liable upon its express promise to pay, given as a consideration for plaintiff's forbearance to perfect a mechanic's lien. The defendant Utley is liable upon both causes of action set out in the complaint, for they are both based upon the same facts, namely, that he purchased and agreed to pay for the materials. We have, therefore, this situation: One defendant is liable on both causes of action, each of the other two defendants is liable upon a separate cause of action from the other, and is in no way related to or affected by the cause of action pleaded against its codefendant. The Edward Schuster & Co. Inc. is not a party to nor affected by the provision in the bond that renders the Illinois Surety Company liable to the plaintiff, and the Illinois Surety Company in turn is not a party to nor affected by the promise of Edward Schuster & Co. Inc. to pay plaintiff for the material if it would forbear to file a lien. Both these defendants are sued upon an independent promise individual to itself. The fact that it is for the same debt makes no difference. The statutory test is not whether the causes of action pleaded arise out of the same transaction, but whether they affect all the parties to the action. Plaintiff may have two recoveries, but it can have only one satisfaction.

Sec. 2647, Stats. 1913, as amended by ch. 219, Laws 1915, still requires that all causes of actions united in a complaint must affect all the parties to the action. This complaint violates that section, in that the cause of action set out against the Illinois

[7] Statement condensed.

Surety Company does not affect the Edward Schuster & Co. Inc. and in that the cause of action against the latter does not affect the former. The cases cited by plaintiff do not touch the precise question at issue. They relate generally to the subject of who are necessary or proper parties to an action. The requirement that the causes of action which may be united in a complaint must affect all the parties to the action is as imperative now as it has been ever since sec. 2647 was first enacted. Our court has uniformly held that causes of action founded upon different rights of recovery cannot properly be united unless all the parties to the action are affected by each cause pleaded.[8] Greene v. Nunnemacher, 36 Wis. 50; Hoffman v. Wheelock, 62 Wis. 434, 22 N. W. 713, 716; Hughes v. Hunner, 91 Wis. 116, 64 N. W. 887; Blakely v. Smock, 96 Wis. 611, 71 N. W. 1052; Hawarden v. Youghiogheny & L. C. Co., 111 Wis. 545, 87 N. W. 472; Tyre v. Krug, 159 Wis. 39, 149 N. W. 718.

Order affirmed.

RINARD v. O. K. C. & E. R. R. CO.

Supreme Court of Missouri, 1901. 164 Mo. 270.

MARSHALL, J. This is an action for damages for the killing of plaintiff's husband, caused by a collision of two trains upon the defendant's road, near Galt, in Grundy County, on Dec. 23, 1897. The plaintiff obtained a verdict for five thousand dollars and the defendant appealed.

The amended petition contains three counts.

The first count alleges that Samuel W. Rinard, plaintiff's

[8] A number of cases dealing with the problem of misjoinder because of a difference in parties will be found in the section dealing with the joinder of parties, ante, p. 166.

For other situations where the joinder is improper for this reason, see Doan v. Halley, 25 Mo. 357, (1857), count on a promissory note joined with a count to foreclose the mortgage, securing it, where the parties to the two instruments were not the same; Plankington v. Hildebrand, 89 Wis. 209, (1895), same facts.

Hawarden v. Coal Co., 111 Wis. 545, count in favor of one of the plaintiffs joined with a count in favor of all the plaintiffs; Clark v. Ry., 31 Wash. 658, count against two defendants joined with a count against one of them.

husband, was in the employ of the defendant as assistant road-master, and that it was his duty to pass over the defendant's road and to ride in its cars; that on Dec. 23, 1897, while riding in the caboose of one of defendant's trains, known as a work train, near Galt, it collided with another train on defendant's road, and he was injured so that he died. It further alleges "that the train upon which the plaintiff's said husband was riding was backing, going west from or near the city of Galt to the town of Dunlap; that the other said train so colliding with said work train was going east towards the city of Galt, and that whilst so running and moving in opposite directions upon the same track, said trains collided, the engine of the train so going east and the caboose of the work train aforesaid striking each other with great force." Then after alleging that the deceased was without negligence or fault, the petition charges that the collision was, "the result of and occasioned by the negligence of the servants, officers, agents and employees of defendant while running, conducting and managing said locomotives, cars and trains aforesaid."

The second count charges that the deceased was engaged "in directing and managing divers other persons, and assisting them somewhat in the taking up of certain rails and ties upon defendant's roadbed and railway aforesaid, and in replacing and relaying the same with other rails and ties, and in doing and directing other things in and about defendant's roadbed and tracks; that said work was being done by certain person or persons, company, or corporation, being styled and designated as the 'Missouri Railway Construction Company'; that whether said person or persons, corporation or company, was in fact defendant or an association of persons, composed of directors, officers or other persons connected with the defendant, or a mere myth, plaintiff is unable to say, and as to whether said work was being done under contract between defendant and said company—pretended or real—plaintiff is unable to state, but plaintiff avers the facts to be, that said work was being done with the knowledge and consent of the defendant and its officers. And plaintiff further avers the facts to be, that in the discharge and performance of her said husband's (Samuel W. Rinard) duties, it became necessary, as a part thereof, (as was well known by defendant) that he, said Rinard, ride from place to place upon said defendant's railroad upon defendant's trains,

especially its work or construction train which said train was provided and furnished by the defendant to transport him (said S. W. Rinard) from place to place in safety over its said line of road where said S. W. Rinard, in the discharge of his duties aforesaid, was required to be and work, and that under said S. W. Rinard's employment ofresaid, he was required to work and be upon divers parts of the defendant's said roadbed and line of railway between the city of Trenton, in said Grundy County, and the city of Milan, in Sullivan county, Missouri." The collision and negligence is then charged as in the first count.

The third count charges that the defendant, for a valuable consideration, undertook to transport the deceased on one of its trains known as its "work extra" or "work train," from at or near the city of Galt to the village of Dunlap, and that while so riding the collision occurred. The negligence charged was as in the first count.

The original petition contained only the first count. When the amended petition was filed the defendant moved to require the plaintiff to elect on which count she would stand, and upon this motion being overruled, the defendant moved to strike out the second and third counts, as being a departure from the original cause of action pleaded and as being inconsistent with the first count, and upon this motion being overruled, the defendant moved to require the plaintiff to make each count more definite and certain by specifying the officer, agent, or employee whose negligence occasioned the injury, and upon what particular train such officer was negligent, and this motion being overruled the defendant filed an answer, which is a general denial and a plea of contributory negligence. * * *

The refusal of the trial court to compel the plaintiff to elect upon which count in the petition she would stand, is assigned as error.

It is claimed that the counts are inconsistent, in that the first count alleges that deceased was an employee of the defendant as assistant roadmaster, while the second count alleges that he was an employee of the Missouri Railway Construction Company, and the third count alleges that he was a passenger.

On the other hand, the plaintiff contends that the gravamen of the three counts is the negligent running of the trains—one or both—which caused the collision that produced the death, and that the character of the deceased's relation or non-relation to

the defendant is immaterial as it is liable in any event, whether the deceased was its servant or that of the construction company or was a passenger, and, hence, that the cause of action is single and the same, but is stated in different forms in the three counts to meet any phase of the proofs, and, therefore, the plaintiff cannot be compelled to elect, and a general verdict for the plaintiff is good.

It is as true today as it ever was that repugnancy in pleading is not permissible. But to render a pleading bad the repugnancy must be such that proof of one state of facts pleaded as a basis for a recovery will necessarily disprove another state of facts pleaded as such a basis. A plaintiff may plead a single cause of action in as many different counts as he chooses, to meet any possible state of the proofs, and this will not make his counts repugnant. (Brownell v. R. R. Co., 47 Mo. 239; Brinkman v. Hunter, 73 Mo. 172; St. Louis Gas Light Co. v. St. Louis, 86 Mo. 495; Lancaster v. Insurance Co., 92 Mo. 460.) If any one of the counts in a petition so framed is good, it will support a general verdict. (Idem.) This being true, a plaintiff cannot be compelled to elect upon which count he will stand.[9]

In the case at bar, the cause of action is single. It is not material whether the deceased was a servant of the defendant, or of the construction company, or a passenger, for his widow's right to recover is not impaired in either case, under the laws of this state as they now and were December 23, 1897, when the accident occurred. (Powell v. Sherwood, 162 Mo. 605.) There was no error in overruling the motion to elect. * * *

Judgment affirmed.

ASTIN v. C. M. & ST. P. RY. CO.

Supreme Court of Wisconsin, 1910. 143 Wis. 477.

Action to recover compensation for damages alleged to have been caused to the surviving widow of plaintiff's intestate by

[9] See also Brickman v. Hunter, 73 Mo. 172, that it was proper to declare in one count on an instrument as an acceptance and in another on the same instrument as a promise to accept.

the wrongful conduct of defendant's employees, causing his death.

The complaint states a cause of action based on the theory that ordinary negligence of defendant's servants was the proximate cause of the death of plaintiff's intestate, and a second cause of action grounded on the theory that gross negligence of such servants was such cause, in that they, in utter disregard of the personal safety of such intestate and conscious of his peril, caused a locomotive under their charge and control to collide with him at a public crossing of defendant's track, causing his death.

On motion in defendant's behalf plaintiff was ordered to elect between the two causes of action on which he would rely. Upon failure to comply therewith and on motion in defendant's behalf, the action was dismissed and judgment rendered accordingly. Plaintiff appealed therefrom.

MARSHALL, J. If a person, owing a duty to another respecting that other's personal safety, violates it, inflicting upon such other corporal injury, under such circumstances that it is difficult for him, by the aid of professional advice to satisfactorily determine whether the violation was characterized by what is known as gross negligence, or by the milder type of wrong denominated ordinary negligence—may such person have the wrong, whatever be its nature, redressed in a single action to recover for his injury, pleading in one cause of action liability on the ground of gross negligence and in a second on the ground of ordinary negligence? That is the broad question raised by the appeal.

Solution of the stated question involves the letter of the written law and its spirit as well, and also our judicial Code on the subject of actionable negligence. That a person, who has suffered a personal injury by actionable fault, may be so circumstanced as not to be able to truthfully assert with certainty whether the act be of the higher or the lesser degree of actionable negligence, as the full scope of the term is understood here and in many other jurisdictions—is most naural. That he should not be obliged, regardless of circumstances—to seek redress on one theory alone, his recoverable compensatory damages, whether claimed upon one theory or the other, being the same and dependable upon the same act, and if he fails, even upon the ground that proof of a degree of actionable wrong not

alleged negatives the one alleged, the evidence of every physical fact being practically the same in one case as in the other, leaving the particular degree only a matter of inference of fact, he must go out of court, commence over again and submit the same evidence to another jury—would seem to be the case; testing the matter from the standpoint of reason and common sense.

Our Code of written law respecting the joinder in one suit of two or more causes of action possessed by one person against another, connected with a single subject of action, is very broad. Yet it has its limitations, pretty well defined in the letter of the statute and further defined by more than half a century of administration of it.

The limitations of the written law are not so free from ambiguity but that the court, progressively, has broadened the literal meaning rather than adhered strictly thereto, much less restricted it, "looking to the evils intended to be remedied, the object intended to be attained, the effects and consequences, the reason and spirit."

Many interferences with the speedy attainment of justice under the old system, growing out of arbitrary and technical rules were intended to be substantially, if not entirely superseded by the Code. Thereby the course, from initiation to finality, in the redress of wrongs, was intended to be as plain, as simple, as certain, as speedy, as complete and as economical as practicable in the judgment of the wise men who framed it. Whether their broad concept of the result has been fully realized may admit of some doubt. If so, that the fault may well be attributed somewhat to that judicial inertia, as regards turning from a long established system, the creation of courts, which made such turning slow in some cases and only under coercion in others; could hardly be gainsaid. However, that this court is exceptionally free from any just criticism in that regard, and that opportunity therefor has been growing progressively remote, the history of our jurisprudence must bear unmistakable evidence.

Viewing the broad subject under discussion in the light of the foregoing it would seem that a logical way must exist, permitted, if not commanded, by the Code—when read in the attitude of liberality which conceived it—for vindicating in a single action the right in such a situation as the one suggested, whether inferences from evidence shall finally locate the wrong,

in case of one being established, within the field of ordinary or that of gross negligence. If there be such way and be no interfering adjudications, and yet be no exact precedent to illustrate it, it should be adopted and a new precedent made, vindicating again judicial competency and willingness to efficiently face new situations in harmony with the manifest spirit of the written law. If there be no such logical way, the responsibility is with the lawmaking power. * * *

It follows from the situation stated, that a cause of action sounding in ordinary negligence is one thing, and one sounding in gross negligence is another. Proof of the latter disproves the former. Pleading of the one by itself, in effect, pleads that the other does not exist. They are essentially different yet the actual wrong and the actual injury, and the compensation equivalent in money, is the same, whether the cause of action be in the one or the other. That suggests that there can be but one recovery therefor, but one efficient cause of action in the ultimate. The difficulty, as before indicated, lies, in the main, in fair doubt on the part of the pleader as regards the proper inference to be drawn from evidentiary facts. Such facts may be entirely common to the two situations.

So we return to the opening inquiry. Why in the name of the broad beneficent spirit of the Code cannot justice be rendered in a single action and upon a single trial according as the jury may reasonably draw the inference of fact? If it cannot then perhaps the written law is infirm where the unwritten was not.

If we could view the situation under discussion as involving two causes of action in the ordinary sense, the Code provisions governing the matter are subdivisions 1 and 3 of section 2647, St. 1898. The one permits joining two or more causes of action arising out of the same transaction, or transactions connected with the same subject of action. The other permits joining two or more causes of action for "injuries with or without force, to person or property." Both are subject to the limitation that the causes must belong to one class, affect all the parties, not require different places of trial, and be stated separately. It is manifest without discussion that the two causes of action, so-called, in the situation before us amply satisfy the letter of all those requirements. Do they satisfy the real meaning of the term "several causes of action" as used in the statute?

There is room, as an original matter, to hold that the statute contemplates the existence of causes of action, each to redress a wrong of some sort so far independent of the redress of any wrong involved in any other cause of action, that a recovery in one will not, necessarily, militate against a recovery at the same time in the other. Would not such a holding, leaving no room for exceptions, be construing the written law restrictively, contrary to the ordinary rule requiring remedial statutes to be liberally construed? If a restrictive, rather narrow construction were necessary to carry out a manifest intent, then it would be legitimate.

Is there the manifest intent above referred to further than to the extent of excluding from the scope of the statute the idea of joinability of two causes of action, satisfying the letter of either subdivision referred to, in a case where the assertion of the right to a remedy by one cause of action irrevocably waives the right to redress by any other; as a situation affording the wronged party opportunity to sue for damages on contract, on the theory of its continued existence, or rescind and sue to recover the consideration parted with on the contract, on the theory that it no longer exists? Does the spirit of the statute clearly extend to a situation where, instead of there being opportunity for a choice of remedies by irrevocably surrendering others which are inconsistent therewith, there are two merely apparent remedies, though only one in fact, such two not being inconsistent in the very groundwork, but only in the mere assertion of the existence of a particular essential element in one, negativing existence of a particular essential element in the other, the two being claimed because of uncertainty as to which is proper? In that situation does the unsuccessful assertion of one preclude claiming the benefit of the other?

That the doctrine of election does not apply to a mere choice of a wrong remedy, is familiar. Fuller-Warren Company v. Harter, 110 Wis. 80, 85 N. W. 698, 53 L. R. A. 603, 84 Am. St. Rep. 867; Clausen v. Head, 110 Wis. 405, 410, 85 N. W. 1028, 84 Am. St. Rep. 933. If the idea that the intent of the statute was to exclude joining causes of action upon that species of inconsistency, it is easy to see that it is inefficient to justly respond to the needs of such situations as the one under discussion and many others.

The inconsistency precluding the joining of causes of action,

which we find, in general, treated in the books, is of such character that the doctrine of fatal election above indicated applies. For instance it is said in Maxwell on Code Pleading at 345:

"If the vendor in his petition seeks to recover a judgment for the unpaid purchase money, and also to have the contract canceled because of the failure of the vendee to pay the amount due, the causes of action cannot be joined, because the action to recover the amount due is an affirmance of the contract." * * *

We perceive no reason for departing from anything decided in the cases referred to. They do not militate against both causes of actionable wrong being stated in the same complaint, if stated separately, substantially eliminating indefiniteness as to plaintiff's position by indicating, clearly, that he does not know precisely the phase of actionable wrong the evidence and inferences therefrom will disclose and that, therefore, he proposes to challenge defendant on both and recover on the one actually possessed, but not on the other. It follows from the fact that the two causes of action belong to the same class, satisfy in all respects the letter of the statute respecting the joinder of causes of action, and are not inconsistent in that claiming the benefit of one necessarily waives the other. They are only inconsistent in that though one, for precautionary purposes claim the benefit of both, he can have, in the ultimate, the benefit of but one and not that one except upon a verdict definitely and consistently finding the facts.

The foregoing answers the propositions stated for decision in the opening lines of this opinion. It vindicates the letter and likewise the spirit, before referred to, of the Code. It regards every phase of our judicial code of negligence law, as the same, without material change, has stood the test of more than half a century of administration, and vindicates and harmonizes all the holdings of the court relating to the subject under discussion, leading logically to a decision in this case that the trial court erred in requiring plaintiff to stand upon one of his definitely stated causes of action, abandoning the other, and erred in dismissing the case for noncompliance with such requirement.[10] * * *

Judgment reversed.

[10] But see Payne v. Ry., 201 N. Y. 436, (1911), to the effect that there need be no separate statement of claims at common law and

FRANCE & CANADA S. S. CO. v. BERWIND.

Court of Appeals of New York, 1920. 229 N. Y. 89.

ELKUS, J. The amended complaint contains three causes of action. The claim arises because of the chartering of the steamship *Hermes* by the plaintiff to the defendant. * * *

A demurrer to the complaint was interposed upon the ground that some of the causes of action were inconsistent, viz., that the first was in tort while the others were on contract.

The following question has been certified to this court:

Have causes of action been improperly united in the amended complaint herein, by uniting a cause of action for fraud, inducing the making of a contract, with a cause of action for the breach of such contract?

The defendant claims that the first cause of action is for a fraud in inducing the plaintiff to enter into the contract or charter party, the fraud being a representation by the defendant that it had secured the necessary Federal export license to permit the export of coal, which representation was alleged to be false; that the second cause of action is for the breach of the contract in not paying the entire charter hire, and the third cause of action is for damages for the breach of the contract in failing to secure the same Federal license; and that these causes cannot be united because one is for damages for a breach of the contract and the other is for damages for a fraud in being induced to enter into the contract and that such causes of action are inconsistent.

The plaintiff claims that the two causes of action, the first and third, are not inconsistent because both proceed upon the theory of an affirmance of the contract, in fact, that all three do, and the defrauded party is entitled to both the benefits of the contract and to the damages caused by fraud and that these causes of action may be united in one complaint under the provisions of subdivision 9 of section 484 of the Code of Civil Procedure. This subdivision expressly authorizes the uniting of causes of action upon claims arising out of the same transaction or transactions connected with the same subject of action.

The Special Term overruled the demurrer without opinion

under a statute for the same injury.

and the Appellate Division, by a divided court, reversed this decision and sustained the demurrer, with majority and dissenting opinions.

The majority opinion holds that the first cause of action is an action in tort and that this cannot be united with an action upon the contract in the same complaint; that the proof of the first cause of action disproves the proof of the third; that the theory of the first is that by the fraudulent representation the plaintiff was induced to enter into a contract and suffer damage and that the theory of the third cause of action is that the possibility of the delay causing the damage was foreseen and an express agreement was made to pay a liquidated sum for such delay; that the proof of this provision in the contract would disprove an essential allegation in the first cause of action that the plaintiff entered into the contract on the representation that there would be no delay.

The Code section cited (Sec. 484, subd. 9) provides that causes of action may be united even though one be in tort and one on contract, if they arise out of the same transaction. The tort alleged in the first cause of action arose out of the same transaction as did the third cause of action, but it is said that even if this be so they are inconsistent and, therefore, cannot be pleaded in the same complaint. That is the ground upon which the Appellate Division decided this case.

The allegations set forth in the first cause of action are not in violation of or contrary to the contract of hiring. The plaintiff does not plead these allegations in an attempt to avoid or set aside the contract, but does allege that, in order to induce him to enter into the contract at the price named, the defendant represented that it had the Federal license necessary to permit the sailing of the steamer and, therefore, the plaintiff would not be delayed while the license was being procured. Practically the defendant said to the plaintiff: "We have the license and you may enter into the contract on the assumption that you will be able to sail as soon as the cargo is loaded on the steamer." The defendant did not have the license when the cargo was loaded and it did not arrive until two or three days thereafter.

The plaintiff says in his first cause of action: "You induced me to charter the vessel on the theory that you had the license. I would not have done so had I not believed your statement to be true." This is in affirmance of the contract and it is upon

this affirmance of the contract the plaintiff wants to recover an additional sum, not provided in the contract but growing out of the same circumstances and out of the same facts.[1]

Section 484, subdivision 9, of the Code of Civil Procedure is broad in its meaning. Its proper construction requires a clear conception of the meaning of the word "transaction." We need only consider the word as applied to contractual relations. The meaning as applied to contracts is the embryo stage where the inducements to and proposed obligations of all parties, having been fully considered and with all parties together, either in fact or figuratively, a contract is about to be made and is made. In such case the contract is the fruit of the transaction. Bound within the limits of the "transaction" are the inducements upon which the minds met and the contract arising from such meeting of minds.

It is elemental that damages cannot be recovered in excess of the actual damage sustained. The question of damage is for the jury. The question in this case is whether the damage alleged in the first cause of action, arising out of false representations in the transaction is the same damage for which a demurrage is provided in the contract made in the transaction as alleged in the third cause of action. This is a matter to be determined upon the proof submitted upon a trial. (Bowen v. Mandeville, 95 N. Y. 237; Gould v. Cayuga National Bank, 99 N. Y. 333, 339, 340; Morgan v. Skidmore, 3 Abb. N. C. 92; 20 Cyc. 87; Vail v. Reynolds, 118 N. Y. 297, 302, 303; Heckscher v. Edenborn, 203 N. Y. 210; Pryor v. Foster, 130 N. Y. 171, 176; Wilson v. New U. S. Cattle Ranch Co., 73 Fed. Rep. 994, 997; Union Central Life Ins. Co. v. Schidler, 130 Ind. 214; Van Vliet Fletcher Auto. Co. v. Crowell, 171 Ia. 64.) * * *

The order of the Appellate Division appealed from should be reversed, with costs, and the question submitted answered in the negative.

Order reversed.

1 But it has been held inconsistent to join a count in equity to cancel a contract for fraud, with a count at law for breach of the contract, Rose v. Sheldon, 119 S. W. 225, (1909).

II. *The Separate Statement.*

CHILDS v. BANK OF MISSOURI.

Supreme Court of Missouri, 1852. 17 Mo. 213.

Childs brought an action under the new code, alleging that the defendant had falsely accused and caused him to be accused of embezzlement, and upon this charge had unjustly and maliciously, and without probable cause, caused him to be arrested and imprisoned; that under the color of a search warrant, the defendant had obtained possession of certain valuable papers, and evidences of debt belonging to the plaintiff; that the defendant had caused the dwelling house of the plaintiff to be beset by armed men by day and by night, thus restraining the plaintiff and his family of their liberty, and interrupting their intercourse with their friends; and that the defendant had falsely and maliciously caused the plaintiff to be indicted and prosecuted; for all which grievances, the plaintiff claimed damages to the amount of fifty thousand dollars.

A demurrer to this petition was sustained, and the cause is brought to this court by writ of error.

RYLAND, JUDGE, delivered the opinion of the court:

* * * 2. The new code of practice says the "plaintiff may unite in his petition as many causes of action as he may have." Art. 7, § 12.[1] The petition shall contain "a statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." Art. 6, § 1.

In New York, the code says the complaint shall contain "a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition," and the plaintiff can unite several causes of action in the same complaint, when they are of the same nature. How unite them? By mixing them up in one undistinguished and undistinguishable mass? Clearly not; reason forbids this. It needs not the results of centuries of experience to show us how inconvenient this would be. See 6 Howard's Practice, Rep. 298.

[1] For the present statute, see a nte, p. 269.

In New York, where they have greatly improved the code since it was first adopted, they require each distinct cause of action to be set down with precision and particularity; and if the plaintiff fails to make the proper statements, they will be stricken out as redundant. He is not permitted to throw the burden of analysing his complaint, and of separating the causes of action on the court; nor is the defendant required to do this at his peril. See the case above cited.

Now under our statute, where the plaintiff is permitted to put in his petition as many causes of action as he may have, no matter what may be their nature or origin, there is still greater necessity for him to mark each cause distinctly; separate each cause from its neighbor with proper marks and with proper distinctness, or "the person of common understanding" may not be able to know what was intended; indeed the most acute professional mind may be at a loss to know what is intended.

These observations are necessary in order to make plaintiffs more particular and careful. We have already decided, that multifariousness and duplicity are defects under our law yet; we have not said that they can be reached by a demurrer; nor will we; but then there is a remedy[2] for such defects.

In this case, we cannot say the action is brought to recover a sum of money; nor can we call it an action for malicious prosecution nor false imprisonment. It is one *sui generis*. It was among the first brought under our new code, and it is not to be wondering at, for really our oldest and best lawyers find themselves hesitating—pausing to know what to do.

Upon the whole of the matter set forth in the petition, it is to be seen, that if such things did take place as therein charged against the bank, its servants or agents or officers may be responsible to the persons injured, and against such the law affords a remedy.

The judgment below should, then, be affirmed, and such being the opinion of Judge Scott (Judge Gamble not sitting in this cause), it is affirmed accordingly.

[2] It is now settled that the objection that several causes of action have not been stated separately should be taken by motion instead of demurrer, Bass v. Comstock, 38 N. Y. 21, (1868).

FAESI v. GOETZ.

Supreme Court of Wisconsin, 1862. 15 Wis. 231.

By the Court, PAINE, J.[3] This was an action to foreclose a mortgage, in which a personal judgment was claimed for the deficiency. There was a demurrer for misjoinder of causes of action, and the plaintiff had judgment for the frivolousness of the demurrer.

We have several times decided such demurrers not to be frivolous, and subsequently that they were well taken, where the different cause of action did not affect all the different parties. Walton v. Goodnow, 13 Wis. 661; Sauer v. Steinbauer, 14 id. 70; Cary v. Wheeler, id. 281. Even if we were inclined to review our latter decision, holding the demurrer well taken, we certainly should not hold it frivolous. But the argument of counsel in this case did not change our opinion. It was based entirely on the fact that all the facts stated in the complaint were necessarily stated to establish the equitable cause of action, to bar a redemption. This being so, it was said, that as the complaint did not profess to state any second cause of action separately, therefore it must be held to state only one, although the relief demanded included a judgment both for the legal and the equitable cause of action. We think this position cannot be sustained, for the reason that although all the facts stated were necessary to the equitable cause of action, it is equally apparent that they are entirely sufficient for both causes of action. And therefore, to determine whether they were set forth for the purpose of showing both causes of action, the prayer for relief must be looked to. And this clearly shows that the intention of the pleader was to proceed for both causes of action, as has always been the practice here, until the statute providing for it was repealed. The intention being thus apparent, and the facts stated entirely sufficient to accomplish that intent, it would be allowing the pleader to take advantage of his own fault, to escape

[3] The report fails to give any statement of the facts in this case, but it appears from the syllabus that only one of the defendants was liable on the note. Ed.

from a demurrer on the ground that he did not state the two causes of actions separately.[4]

Judgment reversed.

CURTIS v. MOORE.

Supreme Court of Wisconsin, 1862. 15 Wis. 134.

Appeal from an order overruling a demurrer to a complaint in an action for slander.[5]

DIXON, C. J. * * * The complaint in this action contains three counts, charging the speaking of the slanderous words at different times and in the presence of different individuals; the matter of inducement prior to the *colloquium* such as the pendency of the action before the justice, the calling of the plaintiff as a witness, etc., being stated only in the first. The second and third counts refer to the first. In the first, the words are charged to have been spoken *in the presence* of one Peter Sprague and divers others citizens, but the words *and hearing* are omitted. This is said to be fatal to this count. The others are not objected to. The demurrer is to the whole complaint. It is an elementary principle, that if one of several counts in a declaration be proved (although the proof of all the others should fail), the party must recover upon it, unless it be radically insufficient in law. For by maintaining *one* good count, he establishes a complete right of recovery. And for the same reason, if, on demurrer to the *whole* declaration, any one of the counts is adjudged sufficient in law, the plaintiff will be entitled to judgment on that count, though all the others be defective. Gould's Pl. ch. IX, § 1; 1 Chitty's Pl. 664.

[4] Where a cause of action at law is properly joined in the same complaint with one in equity, they should, of course, be separately stated, Natoma Mining Co. v. Clarkin, 14 Cal. 545, (1860), (case in ejectment joined with an application for an injunction to stay waste, pending the action).

Compare those cases where courts of equity granted legal relief as an incident to the main case in equity, such as reforming a contract and awarding damages, or compelling the execution of a deed and awarding possession, ante pp. 29-37.

[5] Statement condensed and part of the opinion omitted.

But it is urged that as the matters of inducement are stated in the first count only, if that be defective, the others must fail also—that no reference can be made to such inducement for the purpose of sustaining them. And we are referred to Nelson v. Swan, 13 Johns. 483, where it was held, on a demurrer to the whole declaration, one count being confessedly bad, reference could not be made to it for the purpose of aiding the other. It is undoubtedly true, as a general rule, that each count must stand or fall by itself, and that one cannot be helped out by the allegations of another. In that case, each count, taken by itself, was bad in substance, and the court very properly decided that they could not look to the first for the sake of supplying the defects of the second in matters relating to the gravamen of the action. But in matters of mere inducement the question is quite different. It is not only allowable, but correct practice requires, to avoid unnecessary repetition of the same matter, that in the subsequent counts reference[6] should be made to the first, where the inducement is the same, in which case it is considered as if it were repeated in each count. 1 Chitty's Pl. 473. The first count may, therefore, fail as to the cause of action stated in it, and yet stand good as to the inducement in aid of the others. If it be conceded that the first count is bad, a question which we do not examine, the demurrer must still be overruled. * * *

Order affirmed.

GERTLER v. LINSCOTT.

Supreme Court of Minnesota, 1879. 26 Minn. 82.

GILFILLAN, C. J. The complaint sets forth two causes of action. The first is upon a contract between the plaintiff and the defendant, providing for and regulating the separate enjoyment by each of them, at alternate periods, of a mill, of which they were tenants in common, and also providing for the payment, by each, of an agreed part of the expenses in keeping the mill in

6 The reference must be sufficiently specific to identify the part sought to be incorporated, Jasper v. Hazen, 2 N. D. 401.

a suitable condition for business. The second cause of action is in form for a tort, in wrongfully drawing off and diverting water from a stream and pond on which the "mills" which plaintiff and defendant were running and using were situated. To the complaint there is a demurrer, on the ground that several causes of action, to-wit, one upon contract, and one for tort, are improperly united.

There is no doubt that the two causes of action in this complaint cannot be united, unless within the first class specified in Gen. Sts. c. 66, § 98; that is, unless they are included in "the same transaction, or transactions connected with the same subject of action." As a general rule a cause of action upon contract cannot be joined to one for tort; and where they are joined, the joinder is improper unless it appear from the complaint that they come within the first class in that section, and so are excepted from the general rule. The phrase in the statute, "the same transaction, or transactions connected with the same subject of action," is very indefinite, and it is difficult to define satisfactorily the causes intended to be covered by it. But it is evident that where a cause of action of one class is stated, the statement of another cause of action belonging to another class must show that they are parts of the same single transaction, or of a series of transactions all connected together, not independent of each other, and all connected with the same subject of action. The complaint in this case does not meet this requirement.

The facts stated in a first cause of action will not help the statement of a second, except so far as the statement of them in the first is referred to in, and made by such reference a part of, the statement of facts in the second. In this case neither cause of action refers to the facts stated in the other. We might conjecture that the "mills" mentioned in the second are the same as the mill or mills mentioned in the first. That is as far as we could get towards finding a connection between the two causes of action, even if it were permitted to indulge in conjecture, and that would be far from enough to justify the two causes in one action. The demurrer was well taken.

Order reversed.

COMMISSIONERS OF BARTON CO. v. PLUMB.

Supreme Court of Kansas, 1878. 20 Kan. 147.

(Reprinted *ante* p. ——.)[7]

MERRIMAN v. McCORMICK COMPANY.

Supreme Court of Wisconsin, 1893. 86 Wis. 142.

Appeal from an order denying a motion to make the complaint more definite and certain.[8]

ORTON, J. * * * The order appealed from, as well as the first order at chambers, was clearly correct. The complaint does not appear to be liable to the objections named in the rule. It was sufficiently definite and certain as to the purpose of the several causes of action, and they need not be stated in separate counts.

The complaint states that the defendants broke and entered the plaintiffs' close, entered their shops, warerooms, yards, and premises, and took and carried away and converted to their own use one binder and harvester, one mower, seven pieces of canvas, a lot of gray irons, a large quantity of repairs, and various other articles, pieces of machinery, goods, wares, and merchandise, the goods and property of the plaintiffs, of various values, whereby the plaintiffs suffered great damage in the loss of said property and in the interruption to their business carried on in said shops, warerooms, and yard, and they were injured in their business standing and credit, and were damaged in all of the foregoing in the sum of $2,000. The learned counsel of the appellants contend that there are three several and distinct causes of action: (1) Trespass *quare clausum;* (2) trover and conversion; (3) injury to business and credit; and that they should be stated in separate counts. This form of the complaint in such a case has been sanctioned by the common-law

[7] See also in this connection, Boyce v. Christy, ante, p. 8; Millard v. Ry., ante, p. 16.

[8] Statement condensed and part of opinion omitted.

practice of a great many years in England and in this country as the approved form of pleading. There is but one cause of action, and that is trespass *quare clausum fregit*, and the other continuous acts of the defendants are stated as the consequential damages arising therefrom and connected therewith. In the latest case in this court upon the question, Sayles v. Bemis, 57 Wis. 316, the complaint was that the defendant with force and arms broke and entered the plaintiff's premises, and tore down the fence, and the plaintiff's cow got out and strayed from the premises and was drowned, and by reason of these acts of the defendant the plaintiff was damaged $64. It was held that there was but one action, and that of trespass *quare clausum*, and that the other statements were for the consequential damages arising therefrom; and that, if these damages were not proved, the plaintiff would be entitled to recover nominal damages for the breaking and entering.

The approved forms in Chitty's Pleading (2 Chit. Pl. 616) are as follows: "Broke and entered" and "injured fences and gates, cut down trees, and dug holes," and "took and carried away plaintiff's corn, and converted the same to his own use," and "seized and took plaintiff's goods, iron, hops, household furniture, etc., and converted the same to his own use." These forms are under the heading of "Trespass to Lands," and these allegations are for the consequential damages arising therefrom. It will be noticed that the complaint here is nearly in the exact form of the above. See, also McCall's Forms, 248; 1 Abb. Forms, 471; 1 Chit. Pl. 395 *et seq.*; 2 Greenl. Ev. § 273, and note; Johnson v. Gorham, 38 Conn. 519; Jordan v. Staples, 57 Me. 352; Belden v. Granniss, 27 Conn. 513; White v. Moseley, 8 Pick. 356; and other references in plaintiff's brief.[9]

By the Court.—The order of the circuit court is affirmed, and the cause remanded for further proceedings according to law.

[9] Compare Cardozo, J., in Jacobus v. Colgate, 217 N. Y. 235 (1916). * * *

"If the action fails to the extent that it is brought to recover damages for injuries to real estate, the question remains whether to the extent that it is brought to recover damages for injuries to personal property it may not be maintained. The complaint alleges that a stock of flour, wheat, flour sacks and bran sacks, and also office furniture, stationery, books of account, and other personal property were contained "in and about said building or on the premises of said milling plant."

McHUGH v. ST. LOUIS TRANSIT CO.

Supreme Court of Missouri, 1905. 190 Mo. 85.

BURGESS, J. This is an action for damages alleged to have been sustained by the plaintiff, resulting from injuries received in an accident which occurred at the intersection of Delmar and Euclid avenues, in the city of St. Louis, on the 1st day of April, 1901, by reason of one of the cars of the defendant, in which plaintiff was a passenger, being started forward with a jerk just as plaintiff was in the act of alighting therefrom. The petition alleges that as such car approached said Euclid avenue and Delmar avenue defendant's conductor in charge of said car

All this personal property is stated to have been destroyed. On the one side, the plaintiff contends that there are two causes of action, a cause of action for the injury to the realty, and another for the injury to the personal property upon it. On the other side, the defendant contends that there is but a single cause of action for injury to the realty, and that the injury to the personal property is merely aggravation of the damages. We think our decision in Reilly v. Sicilian Asphalt Co. (170 N. Y. 40) requires us to hold that two causes of action have been stated. In that case we held that where a single act works injury alike to one's person and to one's property, the causes of action are distinct. We pointed out that they are governed by different limitations (170 N. Y. at p. 44). Like considerations are applicable here. A single act has injured realty and personalty. One cause of action is local and the other transitory. The act is single, but its consequences are divisible. (See also: Stone v. United States, 167 U. S. 178, 182; Barney v. Burstenbinder, 7 Lans. 210). We do not overlook decisions referred to by the defendant in which averments of injury to personalty were held to be merely incidental (Ellenwood v. Marietta Chair Co., 158 U. S. 105; Houghtaling v. Houghtaling, 5 Barb. 379; Hill v. Bartholomew, 71 Hun, 453; Whatling v. Nash, 41 Hun, 579). In all those cases a wrongful entry upon land was the gist of the action. The plaintiff could not prove the injury to the personal property "without also proving the trespass upon real estate" (Ellenwood v. Marietta Chair Co., supra). But here a wrongful entry is not even alleged. The defendant set fire to the property, but he may have done this without going upon the land at all. It does not even appear that the fire was applied to the buildings first, and that it then spread to their contents. The personal property is described, not only as "in and about the buildings," but also as "on the premises" of the plant. The allegations moreover permit the inference that it was substantial in quantity and value. We see no reason why an action for injury to that property may not be litigated in our courts." * * *

called out "Euclid Avenue!" and said car was stopped at or near said crossing, plaintiff's destination, and plaintiff thereupon, at said invitation, proceeded to alight from said car whilst the same was so stopped, and whilst she was in the act of alighting, and before she had reasonable time or opportunity to do so, defendant's servants in charge of said car carelessly and negligently caused and suffered said car to be started, whereby the plaintiff was thrown from said car, and sustained great and permanent injuries upon her body and legs, and also great and permanent internal injuries, sustaining an injury to her knee and to her side, causing a compression to her side and chest and injury to her lungs, and causing her to have pleurisy, and also injuring her head, and causing a great and permanent injury to her nervous system. And the plaintiff avers that at the time of her said injury there was in force in the city of St. Louis an ordinance of said city by which it was provided that conductors of street cars should not allow women or children to enter or leave the car whilst the same was in motion, yet the plaintiff avers that defendant's conductor in charge of said car, in violation of said ordinance, caused said car to start in motion whilst plaintiff was leaving it, and allowed the plaintiff to leave said car whilst the same was in motion, which violation of said ordinance directly contributed to cause plaintiff's said injuries. The answer was a general denial and a plea of contributory negligence on the part of plaintiff in attempting to alight from a moving car 150 feet east of the eastern line of Euclid avenue. * * *

At the opening of plaintiff's case, and again at the close of all the evidence, defendant moved the court to require plaintiff to elect upon which cause of action alleged in the petition she would proceed to trial. Defendant insists that the petition contains two separate and distinct causes of action, and that the court erred in overruling said motions. The argument is that the first cause of action is for the negligent acts of the conductor in calling out "Euclid Avenue," stopping the car at the plaintiff's destination, and while she, at his invitation, was proceeding to alight therefrom, while the car was standing, and before she had reasonable time or opportunity to do so, the car was negligently caused and suffered to be started, whereby the plaintiff was thrown and injured; while the other cause of action is for the negligent act of the conductor in allowing the plaintiff

to leave the car while the same was in motion, in violation of an ordinance, which violation directly contributed to plaintiff's injury. That the petition states two causes of action is, we think, clear—the first an action at common law for negligence; the other an action for damages alleged to have been sustained by plaintiff by reason of the alleged negligence of defendant's conductor in charge of the car in which plaintiff was a passenger in permitting her to leave said car whilst the same was in motion, in violation of the ordinances of the city of St. Louis. They are independent of each other, and upon either an action might be maintained, but they cannot, under the rules of good pleading, be embraced in the same count. If embraced in the same petition, they should be in separate counts, with a prayer for judgment at the conclusion of each count. When separate causes of action are united in the same petition, each must be distinctly and separately stated, with the relief sought to each cause of action in such manner that they may be intelligently distinguished. Section 593, Rev. St. 1899; Childs v. Bank of Missouri, 17 Mo. 213; Mooney v. Kennett, 19 Mo. 551, 61 Am. Dec. 576; Doan v. Holly, 25 Mo. 357; Marsh v. Richards, 29 Mo. 99; St. Louis, etc., Co. v. City of St. Louis, 86 Mo. 495; Christal v. Craig, 80 Mo. 367; Henderson v. Dickey, 50 Mo. 161; Kendrick v. R. R. Co., 81 Mo. 521; Linville v. Harrison, 30 Mo. 228; Jamison v. Copher, 35 Mo. 483; Ederlin v. Judge, 36 Mo. 351; Southworth Co. v. Lamb, 82 Mo. 242. While there was but one injury, and there could be but one recovery for it, any number of negligent acts preceding the injury and leading up to and contributing to it might properly be set forth in the same count of the petition, if of the same character. An action for damages at common law for negligence cannot be joined in the same count with one for statutory[10] negligence for the very obvious reason that they could have no possible connection with, or in any way be dependent upon, each other. Kendrick v. Chicago & Alton R. R. Co., 81 Mo. 521; Harris v. Wabash R. R. Co., 51 Mo. App. 125. Hill v. Mo. Pac. Ry. Co., 49 App. 520, and same case in 121 Mo. 477, 26 S. W. 576, relied upon by plaintiff, does not announce a contrary rule. Upon the other hand, the acts of negligence preceding the injury in that case were all of the

10 Contra, Payne v. Ry., 201 N. Y. 436, (1911) (one count based on common law and statutory liability for same injury).

same character, and naturally led up to and contributed to the accident, while in the case at bar they were independent of, and had no connection with, each other. Each cause of action was founded on a different right, and each right separate from the other, because not derived from the same source or in the same manner. As the accident resulted from the same transaction, the causes of action could well be joined in the same petition, but in separate counts, with a prayer for judgment at the conclusion of each count. The court, at the instance of plaintiff, instructed the jury upon both causes of action, and authorized a recovery upon proof of either negligence or of a violation of the ordinance, and thus recognized the petition as stating two different causes of action. In case a petition improperly joins two different causes of action in the same count, it has always been ruled by this court that the remedy is by timely motion to require the plaintiff to elect upon which count he will proceed to trial, as was done in this case. Mooney v. Kennett, 19 Mo. 551, 61 Am. Dec. 576; Otis v. Merchants' Bank, 35 Mo. 128; Kern v. Pfaff, 44 Mo. App. 32; Liddell v. Fisher, 48 Mo. App. 454; Christal v. Craig, 80 Mo. 367; Childs v. R. R. Co., 117 Mo. 414, 23 S. W. 373. The case in hand is clearly distinguishable from Bartley v. Trorlicht, 49 Mo. App. 216, and that class of cases, where a number of defects in machinery, all existing at the time of the injury, might co-operate with each other in producing it; and under such circumstances it would be proper to unite them, because the ultimate effect of all the defects produced the injury, and because capable of and likely to co-operate with each other in the result. The motions should have been sustained. * * *

Judgment reversed.

CHAPTER IV.

DEMURRERS.

New York Code of Civil Procedure.

§ 487. The only pleading, on the part of the defendant, is either a demurrer or an answer.

§ 488.[1] The defendant may demur to the complaint, where

[1] Practically all of the codes embody the grounds of demurrer found in the New York Code, but a number of them include one or more additional grounds, such as misjoinder of defendants, lack of certainty in the complaint, or failure to show that the action was begun within the time limited by statute, etc.

For purposes of comparison, see:

Alaska, Code, 1900, § 58; Arizona, R. S., 1913, § 468; Arkansas, Dig. Stat., 1921, § 1189; California, Code Civ. Prac., 1915, § 430; Connecticut, G. S., 1918, § 5631 (substantially different from New York Code) Idaho, Comp. Stat., 1919, § 6689; Indiana, Burn's Ann. Stat., 1914, § 344; Iowa, Comp. Code, 1919, § 7208; Kansas, G. S., 1915, § 6984; Kentucky, Rev. Code, 1900, §§ 92, 93; Minnesota, G. S., 1913, § 7754; Missouri, R. S., 1919, § 1226; Montana, Rev. Code, 1907, § 6534; Nebraska, Ann. Stat., 1911, § 1097; Nevada, Rev. Laws, 1912, § 5040; New Mexico, Ann. Stat., 1915, § 4110; New York, Civ. Prac. Act, 1920, § 277, amended: The demurrer is abolished. An objection to a pleading in point of law may be taken by motion for judgment as the rules provide.

North Carolina, Consol. Stat., 1919, § 511; North Dakota, Comp. Laws, 1913, § 7442; Ohio, Gen. Code, 1921, § 11309; Oklahoma, Rev. Laws, 1912, § 4740; Oregon, Laws, 1920, § 68; South Carolina, Code, 1912, § 194; South Dakota, Rev. Code, 1919, § 2348; Utah, Comp. Laws, 1917, § 6568; Washington, Rem. & Bal. Code, 1910, § 259; Wisconsin, Stat., 1919, § 2649; Wyoming, Comp. Stat., 1920, § 5651; U. S. Equity Rules, 1912, No. 29: Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the

one or more of the following objections thereto appear upon the face thereof:

1. That the court has not jurisdiction of the person of the defendant.

2. That the court has not jurisdiction of the subject of the action.

3. That the plaintiff has not legal capacity to sue.

4. That there is another action pending between the same parties, for the same cause.

5. That there is a misjoinder of parties plaintiff.

6. That there is a defect of parties, plaintiff or defendant.

7. That causes of action have been improperly united.

8. That the complaint does not state facts sufficient to constitute a cause of action.

§ 490.[2] The demurrer must distinctly specify the objections to the complaint; othewise it may be disregarded. An objection, taken under subdivision first, second, fourth, or eighth, of section four hundred and eighty-eight of this act, may be stated in the language of the subdivision; an objection, taken under either of the other subdivisions, must point out specifically the particular defect relied upon.

§ 492. The defendant may demur to the whole complaint, or to one or more separate causes of action, stated therein. In the

court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five day's notice, and, if it be denied, answer shall be filed within five days thereafter or a decree pro confesso entered.

2 An objection to a pleading must be distinctly specified in the notice of motion. An objection under the last section but one must point out specifically the particular defect relied upon, except as otherwise provided in this section. An objection to a complaint, or to a separate statement therein of a cause of action, or to a counterclaim, that it does not state facts sufficient to constitute a cause of action, or that the court has not jurisdiction of the subject of the action or counterclaim, or that the court has not jurisdiction of the person of the defendant, or that another action is pending between the same parties for the same cause, or an objection to a defense that it is insufficient in law upon the face thereof, may be so stated without further particulars. N. Y. Civ. Prac. Act, 1920, § 280, (amended).

latter case, he may answer the causes of action not demurred to.

§ 497. Upon the decision of a demurrer, either at a general or special term, or in the court of appeals, the court may, in its discretion, allow the party in fault to plead anew or amend, upon such terms as are just. If a demurrer to a complaint is allowed, because two or more causes of action have been improperly united, the court may, in its discretion, and upon such terms as are just, direct that the action be divided into as many actions, as are necessary for the proper determination of the causes of action therein stated.

§ 498. Where any of the matters enumerated in section four hundred and eighty-eight of this act as grounds of demurrer, do not appear on the face of the complaint, the objection may be taken by answer.

§ 499.[3] If such an objection is not taken, either by demurrer or answer, the defendant is deemed to have waived it; except the objection to the jurisdiction of the court, or the objection that the complaint does not state facts sufficient to constitute a cause of action.

SECTION 1. ADMISSION BY DEMURRER.

DARRAH v. LIGHTFOOT.

Supreme Court of Missouri, 1851. 15 Mo. 187.

This was an action on an account for the use of a boat and

[3] An objection on either of the following grounds, appearing on the face of a pleading, is waived unless taken by motion:

1. As to the complaint: (a) that the court has not jurisdiction of the person of the defendant in cases where jurisdiction may be acquired by his consent; (b) that the plaintiff has not legal capacity to sue; (c) that another action is pending between the same parties for the same cause; (d) that there is a misjoinder of parties plaintiff; (e) that there is a defect of parties, plaintiff or defendant; (f) that causes of action have been improperly united.

2. As to a counterclaim: (a) that the defendant has not legal capacity to recover upon the same; (b) that another action is pending between the same parties for the same cause; (c) that the counterclaim is not one which may be properly interposed in the action. N. Y. Civ. Prac. Act. 1920, § 278 (amended).

other articles for various periods. A demurrer to the petition (complaint) was overruled, and defendant failing to answer, a judgment *nil dicit* was entered for the amount of the account without proof of any of the items. Defendant appealed from the order refusing to set the judgment aside.[4]

RYLAND, J. The only point necessary for us to notice, is the act of the court below in giving the final judgment.

After deciding the demurrer in favor of the petitioners, and giving time to the defendant to answer, which the defendant neglected to do, the court gave judgment for the petitioners by *nil dicit*, and assessed the damages to the amount of the balance of the account due, as appears by the same in the petition, and interest thereon, making in all the sum of $122.03, without any proof of the items of the account claimed in the petition.

This we think was error. The court after the failure of the defendant to answer, very properly gave the judgment by default or *nihil dicit;* and if it had required the petitioners to make proof of their demand, and on proof had rendered final judgment for the amount so proved, this court would not have interfered.

We see no force in the appellant's objection about the neglect of an order to have the damages enquired into and assessed at the same term; and without such order, the enquiry must not be made until at the next term. All this is rendered necessary by the provisions of the act of 1848 and 9, commonly called the new code, the provisions of which, we apply to the proceedings in this case.

We do not consider that the demurrer admits the items of an account[5] set forth in the petition, so as to do away with the necessity of proof. If the judgment be given on demurrer to such a petition, and defendant should refuse to answer, an enquiry of damages becomes necessary, and this enquiry may be

[4] Statement condensed.

[5] Buller, J. in Green v. Hearne, 3 Term. Rep. 301, (1789): "When a defendant suffers judgment to go by default, he admits the cause of action. And thus far an action on a bill of exchange, and an action for money had and received are alike; but beyond that, there is no similarity. For, in the latter, the defendant only admits something to be due, and as the demand is uncertain, the plaintiff must prove the debt before the jury. But, in the former, as the bill of exchange is set out on the record, the defendant by suffering judgment to go by default, admits that he is liable to the amount of it."

had before the court, if the petitioners waive a jury, or it may be before a jury. See code of practice, Art. XII. § 2.

We reverse the judgment of the court below, as far as respects the enquiry of damages only, and we require the court to take proof of the petitioner's accounts before a jury, unless the petitioners waive a jury, in which event, the court is, itself, to take the evidence and assess the petitioner's damages upon the judgment by default, which remains undisturbed.

This case is, therefore, remanded to the court below for further proceedings in accordance with this opinion, the other judges concurring.

GRIGGS v. CITY OF ST. PAUL.

Supreme Court of Minnesota, 1864. 9 Minn. 246.

(Reprinted *ante* p. 298.)

COOK v. TALLMAN.

Supreme Court of Iowa, 1874. 40 Ia. 133.

The same facts are involved in all of these causes, and they are submitted upon one abstract. The petitions allege that the defendant prosecuted certain suits, wherein the plaintiffs in these actions were defendants, for the purpose of setting aside plaintiff's titles, based upon tax sales and deeds, to certain lands which were claimed by defendant; that plaintiffs were non-residents of the State, and service was had upon them by publication; that such service was illegal, and not sufficient to give the court jurisdiction; and that judgment by default in the actions were rendered against the plaintiffs. The relief asked is that the judgments be set aside, and the proper plaintiffs be allowed to appear and defend in each suit. A demurrer to each petition was sustained, and plaintiffs in each case appealed. The other facts of the case necessary to an understanding of the point ruled, appear in the opinion.

BECK, J. * * * The law in force at the time provides that "the publication must be made by publishing the notice required * * * in some newspaper published at least weekly, and *printed* in the county where the petition is filed, and if there be none printed in such county, then in such paper printed at the next nearest county of this state, which paper shall in either case be determined by plaintiff's attorney." Acts 13th General Assembly, Chapter 142. Code § 2619.

It may be admitted that the newspaper in which the publication may be made, must be *printed* in the county where the suit is brought, and if there be none such then the notice must appear in a newspaper *printed* in the next nearest county. The petition alleges that the newspaper in which the publication was made was printed in Webster county, and that no newspaper was printed in Pocahontas county. It also shows that the notice was published in the newspaper determined by plaintiff's attorney. Now the question to be decided is this: Is Webster the next nearest county as contemplated by the statute? The court will take judicial notice of the boundaries of counties, and their relative location. Webster county lies adjacent to Pocahontas. Four other counties also have common boundaries with it, and it had corners in common with two others. Of these, which, in the language of the statute, is "the next nearest county?" The statute makes no provision as to the town in which the paper is published, further than it shall be "at the next nearest county." Five counties lie equally "*near*" Pocahontas, that is, they have boundary lines in common with it. Suppose in each of these counties newspapers were published, how should the question have been determined as to the one in which the publication should have been made? The statute provides it shall be determined by plaintiff's attorney. It is evident that of these five counties, each being adjacent to Pocahontas county, any one may be considered the next nearest, if so determined in the manner and by the person pointed out in the statute. The publication, therefore, of the notice in a newspaper printed in Webster county, upon the determination of plaintiff's attorney, was a strict compliance with the law.

II. But the petition alleges that Humboldt is "the next nearest county." This contradicts the record pleaded by plaintiffs, which shows that Webster county was so determined in the manner pointed out by law and other facts, the location and

boundaries of the different counties, of which the courts will take judicial notice. A fact which is judicially known to the court is to be regarded as a matter of law, and therefore cannot be pleaded. A contradiction or denial of such a fact cannot be well pleaded, and is not admitted by a demurrer.[6] Rev. § 2917. Code, § 2712. The demurrer therefore did not admit the allegation of the petition just stated.

Other objections to the ruling of the court upon the demurrer are not presented in the argument of plaintiff's counsel. We are required to regard them as waived.

The judgment in each cause is

Affirmed.

SCOFIELD v. McDOWELL.

Supreme Court of Iowa, 1877. 47 Ia. 129.

This is an action to quiet the title and recover the possession of certain lands, which the plaintiffs claim under tax deeds executed November 6th, and recorded November 9th, 1872. The defendant by answer and cross-bill alleged that the fee simple title is in her, and that the title of the plaintiffs is void, for the following reasons:

1. The defendant after the expiration of three years from the date of the sale, but before the execution of the deed, tendered the full amount necessary to redeem from the sale to the

[6] Marshall, J.. in Walhams Oil Co. v. Tracy, 141 Wis. 150, (1910): * * * True. it is alleged in the complaint that the fees are exorbitant; but the question on that subject is not one of fact to be determined by evidence and taken as admitted by the demurrer, as claimed by appellant, merely because a surplus is in fact, or probably will be, collected. If the law, speaking for itself, in the light of common knowledge and adjudications, shows clearly that the fees may reasonably be regarded as mere police expenses, then the allegation to the contrary cannot change the aspect of the matter and make it one to be settled on evidence. It is considered that they can be so regarded. They are about the same as in laws generally on the subject throughout the country, and in no case have similar charges been held exorbitant, so far as we can discover" * * *.

county auditor, and to the holders of the certificates, which they refused to accept.

2. The lands were sold at tax sale in October, 1869, without being advertised for sale.

The plaintiff demurred to the answer and cross-bill, upon the ground that they presented no defense to the plaintiff's action, and did not entitle the defendant to relief. The demurrer was sustained. The defendant refusing to further plead, a decree was entered for plaintiffs. At the April term, 1876, an opinion was filed reversing the decision of the court below. Upon plaintiff's petition a rehearing was granted, and the cause is again submitted for determination.

DAY, Ch. J. I. That the right of redemption must be exercised within three years from the date of sale was determined by this court in Pearson v. Robinson, 44 Iowa 413.

The plaintiffs claim title to the lands under two tax deeds executed November 6, 1872, and duly recorded. Section 784 of the Revision provides that the deed, when substantially executed as required and recorded in the proper record, shall be conclusive evidence "that the property was advertised for sale in the manner, and for the length of time, required by law." This provision was held to be constitutional in Allen v. Armstrong, 16 Iowa 508 (514); See, also, Madson v. Sexton, 37 Iowa 562.

The answer and cross-petition admit the execution of the tax deeds under which the plaintiffs claim the land. They admit, also, by implication, that the deeds, in form, are in substantial compliance with the law. But they allege that the lands were sold without any advertisement, and that the deeds are, in consequence thereof, void. The plaintiffs, instead of taking issue upon this allegation of the answer and cross-petition, demurred thereto. It is claimed the effect of this demurrer is to admit the truth of the allegation; that, the truth of the allegation admitted, the answer sets up a good defense, and the cross-petition a good ground for affirmative relief; and that the demurrer should have been overruled.

It is a familiar principle of pleading that a demurrer admits only facts which are well pleaded. The answer and cross-petition, as we have seen, admit the execution of the tax deeds in question. The law attaches to these deeds certain properties or qualities. One of these is that the deeds are conclusive evidence that the lands were duly advertised for sale. Whenever the fact

that a tax deed has been duly executed is established by the production of the deed in evidence, or by the admissions in the pleadings, the law raises the conclusive presumption that the lands described in the deed were duly advertised for sale. Is it, then, competent for a pleader to admit the execution of such deeds, and at the same time deny the legal inference which the law conclusively raises? It seems to us clear that it is not competent so to plead. If, however, such a pleading is interposed, does a demurrer thereto admit the truth of the allegation improperly made? Suppose a party sued upon a promissory note should admit the due execution of the note, that it was given upon good consideration, that it is the property of plaintiff and unpaid, but should aver at the same time that he owes plaintiff nothing thereon. Would a demurrer to the answer admit the truth of this allegation? Manifestly not. In Gould's Pleadings, p. 470, section 25, it is said: "A demurrer though general, never confesses an allegation which it appears upon the face of the pleadings that the pleader is estopped to make, as if, having pleaded or confessed a record, to which he is a party, he afterwards makes an averment contradicting or impugning it."

Suppose the plaintiffs, instead of demurring, had gone to trial upon the pleadings. The defendant then would not have been permitted to introduce any proof that the lands were not advertised. If, because of the law and the conditions of the pleadings, the defendant would not have been permitted to offer any proof of this allegation upon the trial, it must be true that a demurrer to it does not admit its truth.

The demurrer was properly sustained.

Affirmed.

McKENZIE v. MATHEWS.

Supreme Court of Missouri, 1875. 59 Mo. 99.

NAPTON, Judge, delivered the opinion of the court.

This was a petition for an injunction. The facts stated in the petition were, that the petitioner was the owner of a certain tract of land described therein; that Mathews & Brumbach threatened to commit waste on it, by cutting down and hauling

away timber from it—which would be an irreparable loss to said land. An injunction was therefore asked, to restrain said defendants from cutting any timber or committing any waste on said land, and for such other relief, etc. The application was made to the Circuit Judge, at chambers, in August, 1871, and an injunction was directed, upon bond being given by the petitioner. The bond was given and the injunction issued August 16th, 1871.

At the May term, 1872, of the Circuit Court, a demurrer was filed to this petition on the ground that the facts stated in the petition furnished no ground for the relief prayed, inasmuch as no insolvency was alleged, nor was it averred that there was not an ample and complete remedy at law; nor was there any allegation that any action was pending for the possession of the land upon which defendants were said to have an intention of cutting timber. The demurrer was sustained, but nothing further appears to have been done at that term.

On Dec. 10th, 1872, the defendants filed their motion to dissolve the temporary injunction, and for an assessment of damages. This motion was sustained and, neither party requiring a jury, the court proceeded to assess the damages upon the testimony submitted.

The defendant, Mathews, on this inquiry, testified that he had a contract with Brumback to deliver to him $200 worth of lumber; that he had cut the logs from which the lumber was to be sawed, and as he could not use them, they had greatly depreciated in value, and his loss on this item he estimated at $180. His expense attending court amounted to $13.50. He was also prevented from clearing eight or nine acres of land that he intended to clear, and also from making rails to replace a fence that had been washed away by the flood, which he estimated at $180. His lawyer's fee was $75.

The plaintiff objected to this evidence because the defendants admitted by their demurrer, that the facts stated in the petition were true, and that the plaintiff was the owner of the land. This objection was overruled, and the plaintiff excepted.

The witness also stated that he was in possession of the land and bought it of the railroad company. To this evidence objection was also made on the ground that the defendants, by their demurrer, admitted the ownership of the land. * * *

The plaintiff asked the following declarations of law: "That

the defendants have admitted by their pleadings that the lands mentioned in plaintiff's petition belonged to plaintiff and were the property of the plaintiff, and hence, defendants cannot recover and damages by reason of being restrained from cutting timber off from said lands; 2nd, The defendants cannot recover attorney's fees for defending said suit; 3rd, Defendants cannot recover any damages in this case because there was no answer made by defendants to the petition, before the dissolution of the injunction herein." These last instructions the court refused.

The judgment of the court on the subject of damages was in favor of the defendants, in the sum of $528.

There was a motion to set aside the finding and judgment, which was overruled; exceptions were duly taken to all the rulings of the court, and the case is brought here by appeal.

The judgment of the court on the demurrer was obviously right. The petition was substantially defective in almost all respects. It is impossible to conjecture from its terms whether the plaintiff or defendant was in possession of the land. If the plaintiff was in possession, then it is not shown that an action of trespass would not have attained all the objects desired. There is no allegation of the insolvency, nor any sufficient allegation of irreparable damages. The former is not always necessary, but in regard to the latter, a general averment that damages threatened are irreparable is insufficient. It must be shown how, and in what way, and for what reason, the threatened damages are irreparable. What damages are irreparable is a question to be decided by the court from the facts stated.

If we chose to infer from the petition that the defendants were in possession, then it is a mere matter of conjecture what title they claimed, if any; whether they were lessees for years, or tenants for life, or holding under an asserted fee simple title. If the title was in dispute some proceeding on the part of the plaintiff ought to have been stated, to which the injunction would have been auxiliary.

The only question in this case is as to the damages. It is not perceived why Brumback was made a party defendant. The testimony of Mathews that he was prevented from clearing seven or eight acres of land during the pendency of the injunction seems to be a consequential damage too remote; but the only objection to that testimony was, that the demurrer admitted the title of plaintiff. This objection was overruled by the court and

we think properly. A demurrer admits facts well pleaded, but only for the purpose of deciding the question raised by it; the statements in the petition demurred to are no evidence on the question of damages, or on the general issue. (Berne v. Phillips, 10 Conn. 62.) * * *

The question in regard to the damages was one for the jury, or in this case for the Circuit Court, to whom the facts were submitted. The objections to the items offered were insufficient, and, although we think, in regard to the item of two hundred dollars, which was charged for being prevented from clearing seven or eight acres, that it was inadmissible because too remote; yet as the only objection to it was, that the demurrer admitted the title of plaintiff, and this objection was not a valid one, we will not disturb the judgment.

Judgment affirmed.

DODGE v. COLBY.

Court of Appeals of New York, 1888. 108 N. Y. 435.

The complaint herein contained three counts. The first two alleged in substance that plaintiff was the owner in fee of certain lands situate in the state of Georgia; that defendant and his agents "caused various persons to cut timber and take turpentine, the property of the plaintiff," from said lands. * * *

The third count, after repeating the averments in the other two counts, alleged "that the defendant and his said agents acting in the premises by his authority, without reasonable or probable cause, and with full knowledge that neither he nor those for whom the plaintiff alleges that he is acting, owned the said lands or had any meritorious claim thereto or interest therein, have publicly and widely circulated both in the state of Georgia, in this state, in the state of Massachusetts, and in other parts of the United States, the assertion that the plaintiff was not the owner of or interested in the said lands."

The complaint, after specifying various occasions where defendant himself had made such assertions, and setting forth the same, set forth various articles published at the instigation and by the procurement of the defendant in different news-

papers, to the same effect, i. e., that plaintiff had no title to the lands, but that the same were owned by defendant and his associates. * * * and that in consequence of the said action of the defendant and of his said agents not only has the plaintiff been unable to sell such lands, timber and turpentine to such persons, but he has been wholly prevented from selling the same to any persons whatsoever, and that in consequence the plaintiff has lost large sums of money which would have been received by him upon such sales; that the plaintiff charges that the statements and assertions hereinbefore mentioned, in so far as they represent, either directly or indirectly, and in whatever language, that the plaintiff was not the owner of or interested in the said lands, or that the defendant, and those for whom he alleges that he is acting, did own the same, were false and defamatory and were made and caused to be circulated and published by the defendant and by his agents, maliciously and with the intent to injure the plaintiff and his title to the said lands."

The substance of the demurrer is set forth in the opinion.[7]

RUGER, C. J. The defendant demurred to the complaint in this action, and to each separate cause of action stated therein, upon three grounds, viz.: *First,* that the court has not jurisdiction of the subject of the action; *second,* that the complaint does not state facts sufficient to constitute a cause of action; *third,* that causes of action have been improperly united, viz., a cause of action for slander of title, which is a transitory action, with one for trespass on lands without the state, of which the court has no jurisdiction. The special term overruled the demurrer, and on appeal to the general term that court reversed the order of the special term. The general term held that the first and second counts of the complaint each stated a cause of action arising out of trespasses upon lands situated in the state of Georgia, and that in respect to such actions the courts of this state had no jurisdiction, and therefore sustained the demurrer to those counts. * * *

We are, however, unable to agree with the general term in the conclusion reached by it that the third count does not state a good cause of action. We are inclined to think that this result was arrived at through inadvertence in failing to observe the

[7] Statement condensed and part of opinion omitted.

allegation in the count, that the statements alleged to be slanderous "were false and defamatory, and were made and caused to be circulated and published by the defendant and his agents, maliciously and with the intent to injure the said plaintiff and his title to the said lands." The demurrer concedes the truth of this allegation, and renders it improper for the court to refer to the statements so alleged to be false, defamatory and malicious, as the foundation of a claim that they were made in good faith and in the exercise of a lawful right on the part of the defendant to assert his title to the lands referred to. The statement in the count alleged to have been made by the defendant that his title had been investigated by four able legal gentlemen who unanimously concurred in pronouncing the plaintiff's title bad, was precisely one of the statements which the complaint alleged to have been false, defamatory, and malicious,[8] and the truth of which characterization was admitted by the demurrer. It was error, therefore, in the court below to refer to this statement as proof of the propriety of the defendant's claim to be the owner of the lands, or as justifying, in any degree the alleged slanderous statements. We are of the opinion that this count of the complaint substantially complied with the requirements of the rule relating to the statement of a cause of action for slander upon title.

Our conclusion, therefore, is that judgment of the general term should be affirmed, except in so far as it relates to the third count, and as to that it should be reversed, and that of the special term affirmed, without costs to either party upon this appeal.

Judgment reversed.

AMERICAN TRADING CO v. GOTTSTEIN.

Supreme Court of Iowa, 1904. 123 Ia. 267.

Appeal by plaintiff from judgment on demurrer to its complaint.

[8] See Mitchell v. Jenkins, 5 Barn. & Ad. 588, (1833), that in an action for malicious prosecution the question of malice is one of fact for the jury.

McCLAIN, J. The objection raised by the demurrer to the plaintiff's recovery on the Illinois judgment set out in the petition is that the Illinois court had no jurisdiction of the defendant, and, therefore, the judgment rendered is void. The claim of want of jurisdiction is predicated upon two grounds: First, that in its bill of complaint in the Illinois court the complainant (plaintiff in this action) did not ask relief by way of a personal judgment against the defendant; and, second, that after rendering a final decree in the action which did not include any personal judgment against the defendant, the Illinois court proceeded without jurisdiction to render a subsequent decree, which is the one relied on by plaintiff, in which it is adjudged that the complainant recover of the defandant the sum of $532.93, for which execution shall issue as upon a judgment at common law. It is sufficiently shown by the allegations of the complaint that the defendant appeared in the Illinois court so as to confer upon that court jurisdiction to render a personal judgment, provided the court had the power in such proceeding and at the time the final decree was rendered to enter a personal judgment. In the complaint filed in the Illinois court relief is asked by way of foreclosure of a lien against certain personal property alleged to belong to the defendant for certain storage and handling charges in connection with such property shipped by defendant to complainant at Chicago for sale, with an additional prayer for "such other and further relief in the premises as equity may require and as to the court may seem meet." The objection that this complaint did not give the Illinois court jurisdiction to enter a personal judgment is not well taken, for several reasons. In the first place, the decree of the Illinois court having jurisdiction of the parties is conclusive as against collateral attack on the question of law as to whether the complaint was such as to warrant a personal judgment. There are, no doubt, expressions in text-books and opinions to the effect that a judgment for relief, not asked for in the complaint, is void for want of jurisdiction, but, as far as any authorities to this effect are cited for appellee, they relate to cases where the question was raised by way of appeal or other method of direct attack, or where the judgment was by default, and therefore without jurisdiction, except in so far as the defendant was advised by the notice of summons and the complaint or other pleading filed that judgment might be rendered against him. It is not neces-

sary now to discuss the authorities on this subject, as our conclusion is sufficiently supported by other considerations hereinafter stated.

It seems to be well settled under the authorities that a prayer for general relief in a complaint in equity will sustain a personal judgment. Iler v. Griswold, 83 Iowa 442, 49 N. W. 1023; Thomas v. Farley Mfg. Co., 76 Iowa 735, 39 N. W. 874. Thus, in Cushman v. Bonfield, 139 Ill. 219, 28 N. E. 937, it is held that a bill for the specific enforcement of a contract, which also contains a prayer for general relief, will support a money decree, although the specific relief asked cannot be given. And to the same effect are Gibbs v. Davies, 168 Ill. 205, 48 N. E. 120, and Penn v. Folger, 182 Ill. 76, 55 N. E. 192. We think there can be no doubt of the power of the Illinois court, as a general principle of equity practice, to enter, as it did, personal judgment for the balance of the indebtedness of defendant to the complainant after the application in discharge of complainant's lien of the amount realized by judicial sale of the property subject to the lien. But, if there could be any doubt of the sufficiency of the complaint to sustain the decree for a money judgment under the general rules of procedure recognized in this state, it is removed, so far as this case is concerned, by plaintiff's allegation in an amendment to his petition that by the general usage and practice of courts of equity in the state of Illinois and the decisions of the Supreme Court of said state a court of chancery of that state has jurisdiction under such prayer for general relief to enter a personal judgment when the same is consistent with the allegations of fact contained in the bill, and that the decree of the Illinois court was rendered in accordance with such usage and practice. This allegation of fact as to the law[9] of Illinois is confessed by the demurrer, and we are bound, therefore, to assume, for the purpose of this case, as it is now before us, that the personal judgment was sufficiently warranted by the allegations of the bill of complaint. * * *

Judgment reversed.

[9] When a pleading sets out the terms of a foreign statute, the construction placed upon it by the pleader is not admitted by demurrer. Finney v. Guy, 189 U. S. 335, (1903).

SECTION 2. GROUNDS OF DEMURRER.

HAYDEN v. ANDERSON.

Supreme Court of Iowa, 1864. 17 Ia. 158.

Action on a replevin bond in which the breach assigned was the failure to comply with the judgment for the return of the property.

The defendant's answer set up amongst other things that the property had never been taken from the plaintiff or delivered to the defendant under the writ of replevin.

To this answer the plaintiff filed his demurrer, drawn with evident care, and at great length.

I. To so much of the answer as averred that the property was never taken from plaintiff, and never came to possession of defendant. Because, First, That it does not appear that the replevin suit mentioned in the answer is the same suit, in which the bond sued on was given. Second, The identity of the property is not shown. Third, It is incompetent to go behind the judgment to show that the property was not taken. Fourth, The judgment estops the defendant from saying he did not have possession of the property.

II. To so much of the answer as avers ownership in Higgins —for the same reason in substance as above. * * *

This demurrer was overruled by the court below, to which the plaintiff then excepted, and now appeals.[1]

COLE, J.—A demurrer is proper where a pleading appears on its face to be defective either in substance or form; it is a declaration that the party demurring, will go no further, because the other has not shown sufficient matter against him to require an answer: 1 Chitty on Plead. 661. A demurrer admits the *facts* pleaded, but controverts their *legal* sufficiency. A demurrer, then, can only be properly interposed, where the party controverts the legal sufficiency of the matter stated in the entire count or petition. It is not competent to assail a clause, or a sentence, or several clauses or sentences, in a count or petition by demurrer. A demurrer is not a pruning hook, with which to rid a pleading of foreign or improper matter; nor

[1] Statement condensed and part of the opinion omitted.

is it a sword, with which to attack and cut off redundant or impertinent averments in a pleading. If a count in a pleading contain sufficient statements to constitute a cause of action or defense, it is not vulnerable to a demurrer, although it may also contain very much of foreign, improper, redundant, impertinent or scandalous matter. Nor can such matter be reached by demurrer; and, therefore, a so-called demurrer "to all that part," or "to as much as sets up," &c., in a certain count, does not rise to the dignity of a demurrer, and is not entitled to its name, and whenever sufficient matter is stated in such count to constitute a cause of action or defense, such so-called demurrer should be overruled.

Where matter which should properly be stated in different counts, is all stated in one count, it may, on motion, be separate (Rev. § 2903), but cannot be reached by demurrer, Swords v. Russ, 13 Iowa 603. Where matter is redundant or irrelevant, it may be struck out on motion (Rev. § 2946), but redundance cannot be corrected by demurrer. Davenport Gas Light and Coke Company v. The City of Davenport, 15 Iowa 7. Where a whole pleading is impertinent or immaterial, it may be struck from the files. Man v. Howe et al., 9 Iowa 546; Keeny v. Lyon, 10 Iowa 546. And, where statements are not sufficiently full or specific, the defect cannot be reached by demurrer. Byington v. Woods et al., 13 Iowa 17. But it must be by motion. Rev. §§ 2918, 2948. The demurrer in this case is not specifically to any one count of the answer, nor to the answer as a whole, but the several grounds of demurrer are set out as applicable "to all that part of said answer in which it is alleged," &c. This manner or form of demurrer, when applied to a part only of a count or pleading, is insufficient or bad; but in this case, the several parts of the demurrer, when taken together cover the entire answer, and it will, therefore, be regarded and treated as a demurrer to the answer. We are the more willing to extend this generous, and almost unwarrantable liberality of construction to the demurrer in this case, for the reason that it was regarded and treated as a demurrer by the court below, as well as by counsel in this court. * * *

Judgment reversed.

ARTHUR v. RICHARDS.

Supreme Court of Missouri, 1871. 48 Mo. 298.

CURRIER, Judge, delivered the opinion of the court.

The court sustained a demurrer to the petition and dismissed the suit. The judgment of dismissal was informal, but it was final and fatal to the plaintiff's action. The dismissal terminated the suit in the circuit court, and the plaintiff was compelled either to submit to the consequences or bring the cause here.

The defendant demurred upon the ground that another suit was then pending between the same parties and for the same action. It is not pretended that the petition shows any such fact. The demurrer should, therefore, have been overruled.[2] The statute is clear and express on this point. (Gen. Stat. 1865, p. 658, Sec. 6.)

Judgment reversed.

2 Pearson, C. J., in Von Glahn v. Derossett, 76 N. C. 292, (1877): * * *

"The second ground of demurrer is the subject of another objection. It is "a speaking demurrer," as styled by the books. That is, in order to sustain itself, the aid of a fact not appearing upon the complaint is invoked, to-wit: the allegation that at the expiration of the charter, the Bank held a fund which should first be applied to the satisfaction of the debts of the plaintiffs. Whether there be any fund left on hand at the expiration of the charter of the bank is a question of fact that cannot be inquired into upon demurrer, which raises only an issue of law in regard to the cause of action set forth in the complaint." * * *

For the same reason it is difficult to conceive of a case where a demurrer could be based on the first subdivision of the statute, that the court has not jurisdiction of the person of the defendant, except possibly in an action in some court of special and limited jurisdiction, since ordinarily jurisdiction of the person is not a matter to be alleged in the complaint, but is obtained by service of process or the voluntary appearance of the defendant. Ed.

BASS v. COMSTOCK.

Court of Appeals of New York, 1868. 38 N. Y. 21.

MASON, J. The demurrer in this case was properly stricken out and judgment given for the plaintiffs. There is no misjoinder of causes of action. There are two causes of action upon two promissory notes well stated in the complaint, but the accusation against the complaint, as I understand it, is, that the causes of action are not separately stated, as required by section 167 of the Code. This section does declare that the causes of action must be separately stated, but the better opinion seems to be that such causes of action are not improperly united, simply because they are not separately stated by the pleader. (Dorman v. Kellam, 14 How. Pr. 184; 1 N. Y. Pr. 367; Gooding v. McAlister, 9 How. Pr. 123; Robinson v. Judd, 9 How. 378; Peckham v. Smith, 9 How. Pr. 436.) These cases, and others which might be referred to, hold that a demurrer does not lie to a complaint for not separately stating two or more causes of action, they being such as might be properly united in one complaint, if properly and separately stated, but that the remedy of the defendant is by motion. There are cases which hold that a demurrer for such a defect in the complaint will lie and is the proper remedy. (8 How. 177; 9 id. 198; 4 id. 226, 228; 5 id. 171; 11 id. 27.) These cases hold that several causes of action are improperly united where they are not separately stated, as required by section 167 of the Code. The decided weight of authority in the Supreme Court, however, is the other way, and the better reason is, that, when the causes of action are such as may be united in the complaint, a demurrer will not lie for such a cause.

It must be borne in mind that section 167 allows the causes of action upon these two notes to be joined in the same complaint, but it declares that they must be separately stated. If we turn to section 144, it will be seen that a demurrer can only be interposed for the causes stated in that section, none of which touch this case, unless it is the fifth sub. of that section, and which is, that several causes of action have been improperly united.

That is improperly united in the complaint. This section 144 states, that the defendant may demur to the complaint, when it

shall appear, upon the face thereof, that several causes of action have been improperly united. Now, section 167 declares, that these causes of action may properly be united in the same complaint, and the injunction imposed upon the pleader, that such causes of action shall be separately stated, is a rule of pleading, and which has been violated when this is not done, but I am not able to perceive how it can be said that the causes of action have been improperly united in the complaint.

Now, section 144 does not say that a demurrer may be interposed to the complaint where several causes of action, which may be properly joined under section 167, because they are united in one count, and not separately stated. The demurrer is not given for uniting in count separate causes of action, but for uniting in the complaint causes of action, which it is not lawful, under section 167, to unite in the same complaint. It is true, the pleader, in this case, has violated a rule of pleading enjoined by this same section. It does not follow, however, that this demurrer can be maintained. There are other rules of pleading prescribed by the Code, the violation of which will not give the defendant his demurrer.

This view is greatly strengthened by the last paragraph of section 172 of the Code, which makes it the duty of the court, where a demurrer to the complaint shall be sustained because of the improper misjoinder of causes of action, to order them to be separated, and that they be proceeded with as separate actions.[3]

Judgment affirmed.

[3] But the fact that the different causes of action are not separately stated will not deprive a defendant of his right to demur for misjoinder. Wiles v. Suydam, ante, p. 390; Faesi v. Goetz, 15 Wis. 231, ante, p. 420.

Where, as in the principal case, the only objection is the lack of separate statement, a motion to require that to be done would seem to be appropriate, rather than a motion to require the plaintiff to elect, which appears to be sanctioned in some of the states, McHugh v. St. Louis Transit Co., 190 Mo. 85, ante, p. 426.

HILES v. JOHNSON.

Supreme Court of Wisconsin, 1886. 67 Wis. 517.

ORTON, J. These two cases are substantially alike in respect to the questions presented on appeal. The complaints are, first, in ejectment, with the usual averments, as against defendants claiming title to the premises, and it is averred "that the defendants claim title to said lands, and an interest therein and claim to be the owners thereof, and the whole thereof; but this plaintiff insists that said claims of the defendants are unlawful, and their pretended title thereto is void, and ought to be cancelled of record." Following the usual prayer for judgment in ejectment is the following: "And that said defendants' title thereto be adjudged void, and canceled of record, and that this plaintiff have such further and other relief as shall be just and equitable." In the second case there is a claim for damages for waste under section 82, Rev. St., and prayer for injunction against waste *pendente lite*, and there is a general prayer for relief, but no special prayer for the cancellation of the defendants' title. These complaints were demurred to on the ground that several causes of action have been improperly united in said complaints. The demurrers were overruled, and the defendants have appealed. The contention of the learned counsel of the appellants is that, united with the proper averments in complaints in ejectment, are the proper averments and prayer to quiet title, or to remove a cloud from the title of the plaintiff.

It has long been settled by this court that, in order to make a complaint multifarious, the count which is claimed to be improperly joined must set out a good cause of action.[4] Bassett v. Warner, 23 Wis. 673; Truesdel v. Rhodes, 26 Wis. 215; Willard v. Reas, Id. 540; Lee v. Simpson, 29 Wis. 333. The case of Leidersdorf v. Second Ward Bank, 50 Wis. 406, S. C. 7 N. W. R. 306, is not in conflict with the above cases. It is held in that case only that *if* the complaint stated *any* cause of action, it stated two causes, and was therefore demurrable. It was not

[4] But see Jacobus v. Colgate, 217 N. Y. 235, (1916), sustaining a demurrer for misjoinder in uniting a good cause of action with one for injury to land beyond the jurisdiction, over which the court had no jurisdiction, and which the court in effect held to be no cause of action at all.

decided whether the complaint stated any good cause of action.

Does either of these complaints state any good cause of action, except in ejectment? An improper demand for relief is not ground for demurrer. State v. Smith, 14 Wis. 564. In Tewksbury v. Schulenberg, 41 Wis. 584, the complaint set out a good cause of action to recover tolls for passing the defendant's logs over the plaintiff's dam and slides, and demands judgment in money, and also that it be declared a lien on the logs. On demurrer to the complaint, it was held that a demand for a greater or different relief than the averments of the complaint show the plaintiff entitled to is not one of the grounds of demurrer under our statutes. It follows that the mere prayer for judgment for cancellation of any title the defendants may have in the premises is not sufficient to make a cause of action, or make the complaint demurrable. To constitute a complaint, there must be "a plain and concise statement of the facts constituting each cause of action." Section 2646, subd. 2 Rev. St. These complaints do not state a single fact which would entitle the plaintiff to such relief. (1) The plaintiff is not in possession. (2) No specific claim of the defendants is stated, and there is no averment that they ever relied upon any specific claim or title. No facts are stated to show that there is any cloud on the plaintiff's title to be removed. In short, there are no averments whatever which constitute any second cause of action upon which the prayer for relief, beyond that in ejectment, could be based. I do not understand that the learned counsel of the appellants seriously contend that there are any such averments, but reliance is placed on the law that none are necessary, and that the prayer is sufficient. The demurrers were properly overruled.

Order affirmed.

PORTER v. FLETCHER.

Supreme Court of Minnesota, 1879. 25 Minn. 493.

(Reprinted *ante*, p. 183.)

TENNANT v. PHISTER.

Supreme Court of California, 1873. 45 Cal. 270.

By the Court: The defendants demurred to the complaint for an alleged misjoinder of parties plaintiff; and the demurrer having been overruled, and an order to that effect entered of record, they subsequently filed an answer, denying the allegations of the complaint, and setting up matter in bar of the action. The action afterwards came on to be tried upon the issues joined by the answer, whereupon the defendants objected to the evidence offered by the plaintiff, the ground of the objection being that which had been taken by the demurrer, to wit: the alleged misjoinder of parties plaintiff. This objection taken at the trial was thereupon sustained by the Court, and the action was dismissed on that ground, the plaintiffs declining to amend their complaint.

We are of opinion that the Court below erred in the ruling made at the trial. The answer did not set up a misjoinder of plaintiffs, nor could it have properly done so, because the objection, if it were one, appeared upon the face[5] of the complaint itself. The demurrer upon that ground had been overruled, and at the trial no objection against the complaint was open to inquiry, except the want of jurisdiction, or that the facts stated in the complaint did not constitute a cause of action. The demurrer for alleged misjoinder having been previously overruled, the case stood thereafter in the Court below as though no such demurrer had been interposed, unless, indeed, the Court should first set aside the order overruling it, and permit the demurrer to be again presented for consideration.

It would be productive of much confusion and probable surprise to parties if a demurrer for misjoinder of parties, or the like, once passed upon may be afterwards in effect renewed at the trial by the mere repetition of the same objections which had

[5] So where a defect of parties appears on the face of the complaint, the objection cannot be taken by answer, Depuy v. Strong, 3 Keys., 603, (1867), ante, p. 180.

been already definitely determined in disposing of the demurrer.

Judgment reversed and cause remanded.[6]

DODGE v. COLBY.[7]

Court of Appeals of New York, 1888. 108 N. Y. 445.

RUGER, C. J.: * * * We concur in the conclusions reached by that court in respect to this portion of the complaint. The counts referred to, we think, under the liberal system established by the code, each clearly stated a good cause of action in trespass *quare clausum fregit*, and entitled the plaintiff, if sustained, to recover for all damages accruing to him from the acts described therein. It constitutes no answer to this proposition that the plaintiff might have recovered, upon the facts stated, some of the damages alleged to have been sustained by him, in an action of trover, so long as the gravamen of the charge was the unlawful intrusion upon his real estate. The cutting and tapping of trees constituted the real basis of the damages claimed. While the counts referred to, each allege the value of the timber and turpentine claimed to have been carried away from the premises of the plaintiff, this is merely incidental to the trespass alleged, and the complaint concludes with a general prayer for judgment which would cover the damages arising from the alleged unlawful entry upon the plaintiff's lands and the trespasses committed thereon, as well as the incidental damages arising from the conversion of his property. The doctrine that the courts of this state have no jurisdiction[8] of actions for trespasses upon lands situated in other states is too well settled to admit of discussion or dispute. Telegraph Co. v. Middleton, 80 N. Y. 408; Cragin v. Lovell, 88 N. Y. 258. The claim urged by the plaintiff that if not permitted to maintain this action he is without remedy for a most serious injury, is quite groundless,

[6] After the case was remanded, the answer was withdrawn and a demurrer for misjoinder finally sustained, Tennant v. Phister, 51 Cal. 511, (1876).

[7] For the statement of this case, see Dodge v. Colby, ante, p. 441.

[8] For the recent statute in New York making such actions transitory, see Jacobus v. Colgate, 217 N. Y. 735.

and affords no reason for the assumption of a jurisdiction by this court which it does not possess. The plaintiff would seem to have the same remedy for the trespasses alleged that all other parties have for similar injuries. His lands cannot be intruded upon without the presence in the state of the wrongdoer, and no reason is suggested why he could not seek his remedy against the actual wrongdoer in the courts having jurisdiction. His remedy is ample, and it is no excuse for assuming a jurisdiction which we do not have, that the plaintiff desires a remedy against a particular person rather than one against the real perpetrators of the injury who were exposed to prosecution in the place where the wrong was committed. * * *

The general term, we think, also erred in sustaining the demurrer to the third count upon the ground that there was an improper joinder of causes of action. It is quite true that under section 484 of the Code of Civil Procedure, causes of action for slander cannot properly be joined with actions for injuries to real property; but this was not the ground of objection stated in the demurrer. The ground there specified was that a cause of action of a transitory nature, of which the court had jurisdiction, had been united with one for trespass upon land in another state, of which the court had no jurisdiction.[9] This is not one of the grounds of demurrer authorized by the Code. It is a proper ground of demurrer that the court has not jurisdiction of any specified cause of action; but this does not authorize a demurrer upon the ground that such causes of action are united with one of which it has jurisdiction. The first and second counts of the complaint must be held bad upon the ground that the court had not jurisdiction of the subject of the action, but no sufficient ground of demurrer has been presented to the third count, and it must, therefore, be held good. The Code requires the grounds of demurrer to be specifically stated, and when that is not done it may safely be disregarded. Code Civil Proc., § 490.

Judgment reversed in part.

9 Compare Jacobus v. Colgate, 217 N. Y. 735, (1916), which seems to hold that a statute giving a right to sue in New York for a foreign trespass to land created a new cause of action where none existed before.

MONETTE v. CRATT.

Supreme Court of Minnesota, 1862. 7 Minn. 234.

Action to recover a tract of land under the Acts of Congress in regard to Indian lands. The defendant demurred on the ground that the complaint failed to state facts sufficient to constitute a cause of action. The appeal was from the judgment for plaintiff on this demurrer.

ATWATER, J.—The first objection urged by the Appellants before this Court, is that this case, as appears from the complaint, is *res adjudicata.* The Appellants demurred to the complaint in the Court below, assigning as the general ground of demurrer, that the complaint did not state facts sufficient to constitute a cause of action. Under this general ground, were several specifications, but not the objection here specifically urged. And it is claimed by Respondents, that the objection not having been made in terms in the court below, cannot here be considered.

The objection here stated by Appellants, if it appears upon the face of the complaint, would be appropriately urged under the general ground specified in the demurrer. It has been repeatedly held that a general demurrer to a pleading, that it does not contain facts sufficient to constitute a cause of action or defense, is sufficient, without further specifications.[10] 3 How. Pr. R. 280; 4 ib. 226; 7 ib. 316; 8 ib. 159; 1 Sel. 359. This principle has been, impliedly at least, recognized in Brown v. Manning, 3 Minn. 37, and in the State v. Batchelder, 5 Minn. 223. In the latter case, there was a general demurrer to the reply, for the reason that it did not state facts sufficient to constitute ground for a reply. That case was decided on the ground that the subject matter was *res adjudicata.*

If a party under such general ground of demurrer, does make certain specifications, we do not think he is necessarily confined

[10] It has been held in some instances that a general demurrer which neither follows the language of the statute, nor specifies the particular objection should be disregarded, Potter v. Wilson, 35 Ind. 348, (1871). Such rulings are of doubtful utility, especially under the usual provision that the failure to state facts sufficient to constitute a cause of action is not waived though no demurrer was interposed. N. Y. Code Civ. Proc. § 499.

in his argument to those specifications, but may urge any which are pertinent to the general objection. Under the general objection the pleader is advised what he is to meet, and should be prepared to sustain his pleading against any specification that may be urged under this general ground. And especially against a specification of the kind here urged, which, if well taken, must be fatal in any stage of the case at which it is raised.[1] We may therefore appropriately consider this objection here, and we do so with the less hesitation in this case, from the fact that the Respondents have elaborately argued the objection upon the merits, and the Court is fully advised of the reasons to be urged against the views of the Appellants herein. * * * In the Federal authority alone is vested the power of the primary disposition of lands belonging to the United States, and it is only where it appears that the title has actually passed out of government in some form, that any ground is laid for the State Courts to adjudicate upon the title. Where, by the claim or showing of the Plaintiff himself, the title of the premises in dispute is in the United States, we can conceive of no possible state of facts that would authorize or justify the State Courts in granting the relief here claimed, to wit, that "the Plaintiff is entitled to the ownership and possession of the premises, with a full and perfect title thereto."

This view disposes of the case and renders it unnecessary to examine the other points raised by the demurrer. The decision of the Court below overruling the demurrer is reversed.

FULTON FIRE INS. CO. v. BALDWIN.

Court of Appeals of New York, 1868. 37 N. Y. 648.

MASON, J.: * * * The action is, in short, to recover for a loss of property, sustained by the plaintiffs' assignor in consequence of the defendant's negligence in suffering the sunken canal-boat to impede the navigation of the canal and endanger the property of those navigating the canal.

1 Accord: Morgan v. Rouse, 53 5 N. Y. 367, (1851). Mo. 219, (1873); Haire v. Baker,

The only remaining question in the case is whether the defendant, under this demurrer, specifying only ground of objection to the complaint, and which is, that the complaint does not state facts sufficient to constitute a cause of action, can insist on the objection that the plaintiffs are not incorporated and have not capacity to sue.

There are six grounds of demurrer to the complaint allowed by the Code. The first is, *"that the court has not jurisdiction of the person of the defendant or the subject of the action."* The second is, *"that the plaintiff has not legal capacity to sue;"* and the sixth is, *"that the complaint does not state facts sufficient to constitute a cause of action."* (Code, § 144.) The 145th section declares that the demurrer shall distinctly specify the grounds of objection to the complaint, and that unless it does it may be disregarded.

And section 147 provides that whenever any of the matters enumerated in section 144 do not appear on the face of the complaint, the objection may be taken by answer. And then comes in section 148, which declares that, if no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court; and the objection that the complaint does not state facts sufficient to constitute a cause of action. The complaint in this case states a good cause of action in favor of John Van Buren, Jr., against the defendant, and a valid assignment and transfer of that cause of action to the plaintiff; and the omission in the complaint to allege that the plaintiffs are incorporated and have capacity to sue cannot be taken advantage of by the defendant on this demurrer because of his omission to specify this ground of objection to the complaint.

There is no force or meaning to language, or this omission to specify this ground of objection to the complaint, operates as a waiver of the objection. The 144th section recognizes six distinct grounds of demurrer to the complaint, and the 145th section declares that the demurrer shall distinctly specify the grounds of objection to the complaint, and the 148th section declares that, if no such objection be taken, the defendant shall be deemed to have waived the same, except the objection to jurisdiction, and that the complaint does not state facts sufficient to constitute a cause of action. The complaint states a good cause of action, and that the plaintiffs have become the owners of it,

by a valid transfer thereof to them, but does omit to allege that the plaintiffs are a corporation having capacity to sue. This objection must, therefore, be regarded as waived.[2] It is just and reasonable that the rule should be so. If this objection to the complaint is well taken, and the defendant had specified this ground of demurrer, the plaintiff would most probably have amended his complaint and inserted proper averments to show them a corporation having authority to sue. It is a question, to say the least, whether such an allegation in the complaint is necessary, and the statute relieves the plaintiff from proving it, unless the defendant sets it up in his answer. (2 R. S. 458, § 3.) The judgment of the Supreme Court must be reversed and judgment given for the plaintiff on the demurrer, with leave to the defendant to answer on the payment of the costs of the demurrer in this court and in the Supreme Court.

HAMILTON v. McINDOO.

Supreme Court of Minnesota, 1900. 81 Minn. 324.

COLLINS, J. Action brought by the plaintiff, as an administrator *de bonis non* of the estate of Russell Search, deceased, upon a judgment rendered in his favor as such administrator in

[2] In Phoenix Bk. v. Donnell, 40 N. Y., 410, (1869), it was held that a demurrer specially assigning lack of capacity to sue could not be sustained in such a case because it did not affirmatively appear from the complaint that the plaintiff lacked capacity to sue; the most that could be said was that the complaint failed to show expressly the plaintiff did have capacity to sue as a corporation.

At common law an express allegation of incorporation was unnecessary, Wolf v. Steamboat Co., 7 C. B., 103, (1849). See also Holden v. Elevator Co., 69 Minn. 527, (1897), that there is nothing in the general provisions of the code to change the rule that corporate capacity is implied in the name.

For the contrary view that an express allegation of incorporation is necessary, see State v. C. M. & St. P. Ry., 4 S. D. 261, (1893). Section 1775 of the New York Code required the complaint to allege the incorporation of the plaintiff or of the defendant, as the case might be, and whether it was a foreign or a domestic corporation.

a court of competent jurisdiction in the state of Illinois. On findings of fact, judgment was ordered for the plaintiff, and this appeal is from an order denying the defendant's motion for a new trial.

The question to be met at the outset arises out of the contention that the complaint does not sufficiently allege plaintiff's appointment as administrator *de bonis non.* The allegations were "that, prior to the proceedings had in obtaining the judgment hereinafter referred to, the above-named Russell Search died in the state of Illinois intestate, and the plaintiff, E. C. Hamilton, had been duly appointed administrator *de bonis non*" of said estate, had duly qualified, and ever since had been, and now is, such administrator. It is claimed by the plaintiff that it sufficiently appears from these allegations that the plaintiff was appointed administrator in the state of Illinois, while it is contended on behalf of the defendants that it clearly appears from the wording of the allegations, and must be presumed, in the absence of any averment to the contrary, that the appointment was by a competent court within the state of Minnesota. We are not compelled to determine this difference of opinion, for in either case the complaint failed to state facts sufficient to constitute a cause of action. It merely alleged the death of Search and the due appointment of plaintiff as administrator *de bonis non.* It was said by this court in Chamberlain v. Tiner, 31 Minn. 371 (18 N. W. 97), and the authorities are abundant in support of the statement that "it is not now necessary, as it was formerly, to make profert of letters testamentary or of letters of administration in the pleadings; but it is necessary for the plaintiff who sues as executor or administrator to allege in a direct and issuable form that he is such. This properly should be done by alleging that he is executor or administrator by virtue of letters issued by a probate court of some county giving the name of the court and the term at which the letters were granted." No form of words is absolutely essential to show plaintiff's authority, but the fact must appear substantially, so that issue may be made upon the allegations, if it is proper to do so. See, also, Rossman v. Mitchell, 73 Minn. 198 (75 N. W. 1053), in which the sufficiency of an allegation in a complaint as to the appointment of a plaintiff as a receiver, under the insolvency law of 1881 and acts amendatory, was considered. Again it has been held, with good reasons therefor,

that in an action by an administrator *de bonis non* the complaint should state the name of the original representative, and that, as no such administrator can be appointed while there is an original executor or administrator, there must be an averment that he is dead, or has resigned, or has been discharged, or that his letters have been revoked, as the case may be. 8 Enc. Pl. & Prac. 669.

Plaintiff's counsel contend that their failure to sufficiently allege in the complaint the representative character of their client has been waived, because no demurrer was interposed upon the ground that plaintiff had not legal capacity to sue, or, if a demurrer would not lie, that there has been a waiver, because the question of plaintiff's capacity to sue was not raised by answer. Gen. St. 1894, §§ 5234, 5235. This contention is completely answered by what was said in Rossman v. Mitchell, *supra*, when disposing of a motion for a reargument, in these words: "The complaint in question stated a cause of action in favor of an assignee or receiver of the insolvent, if there was one; but it failed to state facts showing that the plaintiff was such receiver or assignee." The complaint here failed to state a cause of action, and hence an objection on that ground was not waived by failing to take advantage of the defect by demurrer or by answer.[3] The question could be raised by objection to the introduction of the documentary testimony, or by motion to dismiss when plaintiff rested, as it was.

The point is also made by plaintiff's counsel that the action was not brought by their client as administrator, but in his individual capacity, that he had the right to sue as an individual, and therefore that allegations as to his representative capacity were unnecessary; cases being cited in support of this contention. At common law, and to maintain some causes of action, an executor or administrator could sue in either his official or individual capacity, at his option; but whether the present

[3] See also White v. Jay, 13 N. Y. 83 (1855), in which Denio, J., observed in reference to an action by a receiver:

"In such a case, the appointment of the receiver is a part of the plaintiff's title. It is like the granting of administration or of letters testamentary in a suit by executors or administrators; unless the fact is stated, the plaintiff does not show any right to sue."

For the difference between a right to sue and capacity to sue, see Brown v. Curtis, 128 Cal. 193, post, p. 514.

cause of action is of that class we need not decide. When a statute requires, as it does here, that actions must be prosecuted in the name of the real party in interest, suits instituted by an executor or administrator upon a cause of action belonging to him in his representative capacity must be brought by him in that capacity (8 Enc. Pl. & Prac. 659, 660), and he is expressly authorized to sue by Gen. St. 1894, § 5158.

Order reversed.

TROY AUTOMOBILE EXCH. v. HOME INS. CO.

Court of Appeals of New York, 1917. 221 N. Y. 58.

Appeal from an order affirming a judgment in favor of plaintiff.

POUND, J.—The action was brought to recover upon a policy of insurance on the ground that the plaintiff's automobile was stolen, and while being illegally used by the person taking it was destroyed. The complaint, alleges among other things, that on the 18th day of August, 1913, for a good and valuable consideration paid, the defendant made and delivered to the plaintiff its policy of insurance and also its certificate annexed to the policy, "wherein and whereby the said defendant did insure this plaintiff to the amount of $1,000 from the 30th day of September, 1913, to the 30th day of October, 1913," and that upon the 29th day of August, 1913, the automobile was stolen. It thus appears that the insurance was not effective until after the loss and that the complaint does not state a cause of action. This objection may be raised by demurrer without pointing out the particular defect relied upon (Code Civ. Proc. § 490), but the objection was not waived by failure to raise it by demurrer. (§ 499.) It was raised by motion[4] at the opening of the trial, but without pointing out the defect. It has been held that it is not too late to raise the question for the first time at the close of the trial. (Weeks v. O'Brien, 141 N. Y. 199, 204.)

[4] Under the practice in a number of the states the failure of the complaint to state facts sufficient to constitute a cause of action may be taken advantage of by objection at the trial to the introduction of any evidence under it, Garner v. McCullough, 45 Mo. 348.

The ruling of the trial court denying defendant's motion to dismiss the complaint survives unanimous affirmance and is open to review in this court. (Kelly v. Security Mut. Life Ins. Co., 186 N. Y. 16). The Appellate Division has held that the objection was in such general form that the defendant may not now avail itself of the insufficiency of the complaint.

If this were a matter of variance between the pleading and proof; a failure to allege correctly the terms of the policy introduced in evidence; a mere technicality, the error would be disregarded if it appeared that the substantial rights of the adverse party were not affected thereby. (Code Civ. Proc. § 1317.) "The allegations of a pleading must be liberally construed, with a view to substantial justice between the parties." (Code Civ. Proc. § 519.) But the record is destitute of the suggestion that the loss occurred while any policy was in force. The policy is in evidence. The date of the loss is not in dispute. The proofs follow literally the allegations of the complaint. No other policy was produced on the trial, in the Appellate Division or in this court. We must not guess that a policy covering the date of loss is in existence in order to affirm this judgment. The motion to dismiss addresses itself to the merits. No amendment has been asked for. The correctness of the ruling must be tested by the complaint as it stands, not as it might be changed by amendment. If we affirm this judgment we will hold that the defendant is liable for a loss which did not occur during the life of the policy. The defendant may have been disingenuous but the plaintiff has been careless and the plaintiff must make out its case. Procedure is still a matter of rules. Courts, applying such rules with the utmost liberality, must not assume that which does not appear. Substantial justice regards both parties equally. The defect is so manifest that he who runs may read. Defendant's motion is not like a general objection to evidence or a general motion for a nonsuit where something correctible may be hidden behind generalities. (Haines v. N. Y. C. & H. R. R. Co., 145 N. Y. 235, 238.) It cannot be said that defendant concealed anything. To conceal here means more than failure to reveal. It means purposely to keep from sight. Plaintiff has had ample time to recover from its surprise to the extent of showing that the defect was amendable. When the question was raised neither court nor counsel sought an explanation. The entire responsibility for failure to discover the

defect in the complaint does not rest on the defendant. If we could say that if the defect had been pointed out it could have been supplied, then we might say that good faith and fair practice required the defendant to point it out, but how can we say that? * * *

The judgment should be reversed, and a new trial granted, with costs to abide the event, so that plaintiff may make a motion to amend its complaint if so advised, upon such terms as the Special Term may direct.

Judgment reversed.

SECTION 3. EFFECT ON PRIOR PLEADINGS.

STRATTON v. ALLEN.

Supreme Court of Minnesota, 1862. 7 Minn. 502.

The complaint charged that on the 6th day of January, 1857, Plaintiffs were the owners and possessed of certain personal property (describing the same), and on that said day "the said defendant became possessed of and wrongfully detained from them, said plaintiffs, said personal property, of the value," &c. There was no allegation of a demand or refusal.

Defendants answered, and plaintiffs demurred to the answer. The demurrer was sustained by the court below, and judgment entered in favor of the plaintiff for a return, &c. Defendant renews by writ of error.

EMMETT, C. J.—There was a demurrer in this case to the answer, but the defendant below insists that the complaint is radically defective, in that it appears thereby that the court had no jurisdiction of the subject of the action, (the value of the property being stated at ninety-nine dollars only, and no damages alleged), and because it does not state facts sufficient to constitute a cause of action. Both parties have confined their arguments to these alleged defects of the complaint.

The old rule that a demurrer reaches the first defective pleading, is subject, under our system of practice, to this important qualification, that only an objection to the jurisdiction, and the objection that the complaint does not state facts sufficient to

constitute a cause of action, are saved to the defendant upon a demurrer to the answer; because the statute declares every other defect waived by answering over.[1] These, however, are the very objections relied upon by the defendant below, the plaintiff in error here, and he specifies a number of grounds of objection under each of these heads. But it is only necessary to consider one of these in order to dispose of this case.

It is a well settled rule that, where a person comes lawfully into the possession of personal property, an action cannot be maintained against him to recover possession thereof, until the property shall have been demanded of him, and he shall have refused to give it up. In this case, as no unlawful taking is averred, the possession of the defendant below must be presumed to have been lawful; and as no demand and refusal is alleged, the inevitable conclusion is that no demand was made. The action, therefore, was premature, for until after demand and refusal, no right of action exists.

Judgment reversed.

GARTH v. CALDWELL.

Supreme Court of Missouri, 1880. 72 Mo. 622.

Statutory action of replevin to recover certain corn. There was a verdict and judgment for plaintiff, and defendant appealed, assigning the insufficiency of the complaint in failing to allege that the property came into the possession of the defendant.[2]

Sherwood, C. J.—Granting that the petition be defective in that it does not allege that the property was in the possession of the remaining defendant, Caldwell, yet it does allege that the defendant wrongfully detains the property, and this is an indirect and inferential allegation that the property was in the possession of the defendant; an allegation which, though defective, is certainly good after verdict, since the words "wrongfully detains" necessarily imply the adverse possession of the

1 Accord: Leach v. Rhodes, 49 Ind. 291, ante, p. 287.

2 Statement condensed and part of the opinion omitted.

property sued for in replevin. Tidd's Prac. 919, and cases cited; and it will be presumed (if the evidence be not preserved and overthrow such presumption, International Bank v. Franklin Co., 65 Mo. 105), that those facts defectively stated or omitted, were in proof before the jury rendering the verdict, or else that no such verdict would have been returned. In these instances "such defect is not any jeofail after verdict." 1 Saund. Rep. 228, note 1.

But a reversal cannot occur in this case on account of the defect in the petition, for another very sufficient reason, that the answer "explains well enough how Caldwell became connected with the case," alleging that he had seized and taken it as sheriff, etc., and "denies that he wrongfully detains said property." The answer thus cures any defect in the petition. For the denial that defendant "wrongfully detains" the property necessarily admits the detention, but only denies the wrongfulness thereof. The defendant thereby admits that he has the property in his possession. The allegation in the answer that defendant had seized and taken the property, etc., and asks for its return and delivery to him, also shows that defendant was in possession of the property at the time plaintiff sued out his writ of replevin. These allegations of the answer, by putting in issue that fact, which the petition should have alleged, cure such lack of allegation. Stivers v. Horne, 62 Mo. 473.

Even at common law it was a rule of pleading that an omission to state a material fact, either in the declaration or special plea, would be obviated if the pleading of the opposite party put the matter in issue. This rule was known as "express aider."[3] In an old case in Massachusetts the omission of a necessary averment that the defendants had mills on and below a certain mill-dam, was held supplied by a plea admitting that they were seized and in possession of certain mills, Parker, C. J. remarking: That if "the parties go to trial upon a full knowledge of the charge, and the record contains enough to show the court that all the material facts were in issue, the defendant

3 There is some confusion in the cases as to whether an answer merely denying an essential fact, not alleged in the complaint, will cure the defect. Where the objection is taken before verdict, it seems that such a denial will not aid the complaint, Scofield v. Whitelegge, 49 N. Y. 259, (1872), ante p. 276.

After verdict the rule is probably otherwise.

shall not tread back and trip up the heels of the plaintiff on a defect which he would seem thus purposely to have omitted to notice in the outset of the controversy." Slack v. Lyon, 9 Pick. 62; Bliss on Code Plead. § 437, and cases cited. * * *

Judgment affirmed.

I. B. & W. RY. CO. v. FOSTER.

Supreme Court of Indiana, 1888. 107 Ind. 430.

ZOLLARS, J.—It is alleged in appellee's complaint, that as the result of appellant's negligence, fire escaped from one of its trains passing over its road in Warren County, and ignited rubbish and inflammable material upon its right of way; that the fire spread to his land and destroyed fences, growing pasture and a quantity of hay.

Appellant, by counsel, at the proper time, challenged the jurisdiction of the court, and now insists that the action should have been brought in the Fountain Circuit Court, and not in Warren County.

For a plea to the jurisdiction of the court, and in abatement, appellant answered that it had no office for the transaction of business in Warren County, but had such an office in Fountain county; that it had no agent located in Warren county; that no summons was taken out to the sheriff of Warren county, and that the clerk, upon the order of appellee, issued a summons to the sheriff of Fountain county.

Appellant's contention rests upon the proposition that an action of this character must be brought in the county where the company has an office or agent, in other words, in a county where the company may be said to have a residence, as provided by section 312, R. S. 1881.

We think, however, that the action is for an injury to real estate, within the meaning of section 307 of the code, R. S. 1881, and was properly brought in Warren county, where the real estate is situated. The fire destroyed fences and growing pasture, and these were a part of the realty. Owens v. Lewis, 46 Ind. 489 (15 Am. R. 295), and cases there cited. Their destruction, therefore, was an injury to the real estate. * * *

Upon the foregoing, we conclude that the court below did not err in sustaining the demurrer to appellant's plea in abatement.

The sufficiency of the complaint was not questioned below by demurrer, nor by a motion to arrest the judgment; nor is its sufficiency questioned in this court, except by the assignment that the court below erred in not carrying the demurrer to the plea back, and sustaining it to the complaint. It is a sufficient answer to this assignment of error to say that demurrers to answers in abatement do not reach back to the complaint, because such answers are not addressed to the complaint.[1] Price v. Grand Rapids, etc. R. R. Co., 18 Ind. 137. See, also, Anderson Building, etc., Ass'n v. Thompson, 88 Ind. 405. * * *

Judgment affirmed.

1 See Felton G. & E. Co. v. Telephone Co., 200 N. Y. 257, (1911), to the effect that demurrer to a counterclaim will not be carried back to the complaint.

CHAPTER V.

THE ANSWER.

New York Code of Civil Procedure.

§ 500.[1]—The answer of the defendant must contain: 1. A

[1] This section appears in substance in nearly all of the codes, and in most of them in practically the same language.

See Alaska, Code, 1900, § 63; Arizona, R. S., 1913, § 467, (substantially different from New York Code) Arkansas, Dig. Stat., 1921, § 1194; California, Code Civ. Proc., 1915, § 437; Connecticut, G. S., 1918, § 5632; Idaho, Comp. Stat., 1919, § 6694; Indiana, Burn's Ann. Stat., 1914, § 352; Iowa, Comp. Code, 1919, § 7192; Kansas, G. S., 1915, § 6989; Kentucky, Rev. Code, 1900, § 95; Minnesota, G. S., 1913, § 7556; Missouri, R. S., 1919, § 1232; Montana, Rev Code, 1907, § 6540; Nebraska, Ann. Stat., 1911, § 1102; Nevada, Rev. Laws, 1912, § 5046; New Mexico, Ann. Stat., 1915, § 4115; New York, Civ. Prac. Act, 1920, § 261, amended, (same as § 500, omitting the phrase, "in ordinary and concise language, etc.") North Carolina, Consol. Stat., 1919, § 519; North Dakota, Comp. Laws, 1913, § 7448; Ohio, Gen. Code, 1921, § 11314; Oklahoma, Rev. Laws, 1910, § 4745; Oregon, Laws, 1920, § 73; South Carolina, Code, 1912, § 199, South Dakota, Rev. Code, 1919, § 2353; Utah, Comp. Laws, 1917, § 6575; Washington, Rem. & Bal. Code, 1910, § 264; Wisconsin, Stat., 1919, § 2655; Wyoming, Comp. Stat., 1920, § 5659; U. S. Equity Rules, 1912, No. 30: The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statements of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damages, if not denied, shall be deemed confessed, except as against an infant, lunatic or other person non compos and not under guardianship; but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.

general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. 2. A statement of any new matter constituting a defense or counterclaim,[2] in ordinary and concise language, without repetition.

§ 501.—The counter-claim, specified in the last section, must tend in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action:

1. A cause of action arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action on contract, any other cause of action on contract, existing at the commencement of the action.

§ 507. A defendant may set forth in his answer, as many defenses or counter-claims, or both, as he has, whether they are such as were formerly denominated legal or equitable. Each defense or counter-claim must be separately stated, and num-

The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claim.

2 The plaintiff may demur to a counter-claim or a defence consisting of new matter, contained in the answer, on the ground that it is insufficient in law, upon the face thereof. N. Y. Code Civ. Proc. § 494.

The plaintiff may also demur to a counter-claim, upon which the defendant demands an affirmative judgment, where one or more of the following objections thereto, appear on the face of the counter-claim:

1. That the court has not jurisdiction of the subject thereof.

2. That the defendant has not legal capacity to recover upon the same.

3. That there is another action pending between the same parties for the same cause.

4. That the counter-claim is not of the character specified in section five hundred and one of this act.

5. That the counter-claim does not state facts sufficient to constitute a cause of action. N. Y. Code Civ. Proc. § 495.

bered. Unless it is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer.

§ 508. A partial defense may be set forth, as prescribed in the last section; but it must be expressly stated to be a partial defense to the entire complaint, or to one or more separate causes of action, therein set forth. Upon a demurrer thereto, the question is, whether it is sufficient for that purpose. Matter tending only to mitigate or reduce damages, in an action to recover damages for the breach of a promise to marry, or for a personal injury, or an injury to property, is a partial defense within the meaning of this section.

§ 509. Where the defendant deems himself entitled to an affirmative judgment against the plaintiff, by reason of a counter-claim interposed by him, he must demand the judgment in his answer.

§ 522. Each material allegation of the complaint, not controverted by the answer, and each material allegation of new matter in the answer, not controverted by the reply, where a reply is required, must, for the purposes of the action, be taken as true. But an allegation of new matter in the answer, to which a reply is not required, or of new matter in a reply, is to be deemed controverted by the adverse party, by traverse or avoidance, as the case requires.

SECTION 1. GENERAL AND SPECIFIC DENIALS.

CLARK v. FINNELL.

Court of Appeals of Kentucky, 1855. 16 B. Monroe 329.

Chief Justice MARSHALL delivered the opinion of the court.

Finnell, Kinkead and Winston, commissioners appointed by the Kenton Circuit Court to close the affairs of the Kentucky Trust Company Bank, under the 3d section of an act to amend the charter of said bank, approved January 2, 1852 (Session Acts, 14), brought this action by petition against Clark, the acceptor, Robbins, the drawer, and Mack and Payson, indorsers, of a bill of exchange for $7,321.40, dated at Cincinnati, October

6, 1854, payable thirty days after date, at the Mechanic's Bank of New York, and addressed to Clark at the New England Bank, Boston, Massachusetts. Process upon the petition was served upon Robbins and Payson alone, but Mack united with them in filing an answer sworn to by these three, and a demurrer having been sustained to each paragraph of the answer, judgment was rendered against the defendants without naming them, for $7,321.40, with interest from the 6th day of November, 1854, and for seventy-five cents, the cost of protest, together with the costs of the suit. * * *

The material questions, however, arise on the demurrer to the answer. The first paragraph says the defendants do not owe, and ought not to pay, the amount of the bill, "*for they do not admit* the regular protest thereof, and notice, etc.," as charged in the petition, and require proof, etc. This paragraph of the answer is clearly insufficient under the rule prescribed by the *2d and 3rd clauses of section 125 of the Code.* It neither sets forth new matter, as allowed by the 3rd clause, nor contains a denial of any allegations contained in the petition, nor of any knowledge or information thereof sufficient to form a belief. That the defendants do not admit a certain fact, and call for proof, etc., is not a denial,[3] nor sufficient, under the Code, to put in issue a fact as to which the defendants might have knowledge or belief. The general statement that the defendants do not owe, when the petition merely states the facts from which indebtedness or liability is implied by law, is no proper response to the petition, because it neither denies any allegation of fact, nor states any new matter constituting a defense. But if it were allowed to be good in analogy to the plea of *nil debit* or *non assumpsit,* it might authorize a defense to be made, in the evidence of which there was no indication in the answer. And the object of the Code is that the pleadings shall state facts, and not mere implications of law. The court, therefore, properly sustained the demurrer to the first paragraph of the answer, and for the same reasons it properly rejected the proposed

3 Acc. Sheldon v. Middleton 10 Ia. 17, (1859); Bomberger v. Turner, 13 Ohio St. 263, (1862).

amendment, which in form and substance was nothing but a plea of *nil debit*.[4]

Judgment affirmed.

LEWIS v. COULTER.

Supreme Court of Ohio, 1859. 10 Ohio St. 452.

The plaintiff in error, defendant below, filed an answer to the petition of the plaintiff below, in these words:

"The said defendant denies all the material allegations of said plaintiff in his said petition."

To this, the plaintiff below, demurred, and assigned for cause that the same did not state facts sufficient to constitute a defense to the action. The court below sustained the demurrer, and the defendant excepted, but thereupon took leave to file an amended answer, which he did, and in which he made his denials more specific and certain. On the issue thus joined there was a trial, and the plaintiff below had a verdict and judgment.

The ruling of the court sustaining the demurrer to the first answer, is assigned for error.

By the Court. 1. The court below erred in sustaining the demurrer. The answer, liberally construed, as required by the code (sec. 2), was good on demurrer. But,

2. The defendant below, having filed an amended answer, and had, under that, all the benefits he could have derived from the first answer, the error is not such as requires a reversal of the judgment.

3. The first answer, though good on demurrer, was not sufficiently certain and specific; and, had a motion been made for that purpose, the defendant below might have been properly

[4] Compare Hoffman v. Eppers, 41 Wis. 251, (1876), to the effect that an answer stating that "defendant is not guilty of the grievances in the plaintiff's complaint alleged, etc.", is in substance a good general denial.

required to make the same more certain and specific.[5] A pleader ought not to be permitted, by the use of the qualifying word "material," to assume to himself the determination of the questions as to what facts are material, and thus render a conviction for perjury, on a willfully false verification, difficult or impossible. And where the denial is general, it should be not simply of "all," but "of each and all," or "each and every" of the allegations referred to.

Judgment affirmed.

CANFIELD v. TOBIAS.

Supreme Court of California, 1863. 21 Cal. 349.

COPE, J., delivered the opinion of the court.

This is an action to recover a balance alleged to be due on an account for goods, wares, and merchandise. The plaintiff obtained a judgment upon the pleadings, and the only question is as to the sufficiency of the answer.

The answer admits that the indebtedness once existed, but avers that certain promissory notes, signed by the defendants and indorsed by a third person, were received by the plaintiffs in satisfaction of the debt. It contains a copy of a receipt purporting to have been signed by the plaintiffs, acknowledging that the notes were received in full payment of the amount due, and avers that the notes themselves have been paid. For the purposes of the case, the matters set forth in the answer are to be taken as true, and there is no doubt that these matters, relieved of other considerations, constitute a defense to the action. It is claimed, however, that the answer fails to deny, or denies insufficiently, certain allegations of the complaint charging the defendants with fraud and misrepresentations in procuring the assent of the plaintiffs to the arrangement referred to. The character of the arrangement is fully set forth in the complaint, and the allegations upon the subject were inserted by way of anticipation, and not as a part of the cause of action necessary

[5] But see Montour v. Purdy, 11 Minn. 384, (1866), that such a denial is bad in substance.

to be stated in the first instance. They are not, therefore, such allegations as were required in the complaint, and treating the denials in the answer as insufficient to raise an issue upon them, the question occurs as to whether they are to be acted upon as admitted. The statute provides that every material allegation in the complaint, not specifically controverted by the answer, shall be taken as true; and a material allegation is defined to be one which is essential to the claim, and cannot be stricken from the pleading without leaving it insufficient. (Prac. Act, secs. 65, 66.) It would seem from this that an allegation which is not essential to the claim, and which, therefore, is an immaterial one, is not an allegation necessary to be controverted by the answer, in order to avoid the consequence attached to a failure in this respect as to a material allegation. The language used is equivalent to saying, that unless the allegation is essential to the sufficiency of the pleading this consequence is not to follow, for *expressio unius est exclusio alterius* is the rule in such cases. The only allegations essential to a complaint are those required in stating the cause of action, and allegations inserted for the purpose of intercepting and cutting off a defense are superfluous and immaterial. The matter alleged may be material in the case, but immaterial in the complaint, and a plaintiff cannot by pleading such matter at the outset[6] call upon the defendant to answer it. He must plead it at the proper time and in pursuance of the rules regulating the course of proceeding, and he cannot anticipate the defense to be made and reply to it in advance. The object of such pleading is to put the adverse party upon his oath without making him a witness, and the effect of allowing it would be to establish a system of discovery in conflict with the spirit of the statute. We are of opinion, therefore, that the allegations in question are not such as the defendants were called upon to answer, and that no inference of their truth is to be drawn from a failure to deny them.[7]

Judgment reversed.

[6] At common law it seems that a traverse of a premature allegation was bad on demurrer, but if issue were joined, the verdict might cure the defect, Lush v. Russell, 5 Exch. 203, (1850).

[7] But see Whetstone v. Beloit Straw Board Co., 76 Wis. 613, ante p. 33, apparently sanctioning the practice of anticipating a defence.

KINGSLEY v. GILMAN.

Supreme Court of Minnesota, 1867. 12 Minn. 515.

MCMILLAN, J.[8] This is an appeal from an order of the district court striking out a portion of the defendant's answer. The portion of the answer stricken out is as follows: "The said defendant denies each and every statement and averment, and every part of the same, in said amended complaint contained, as therein stated or otherwise, save as hereinafter stated, admitted, or qualified." The grounds of the motion to strike out this portion of the answer were as follows: That, "the same is so indefinite and uncertain that the precise nature of the defense is not apparent, and that the same does not contain a denial of each nor of any allegation in the complaint, nor of any knowledge or information thereof sufficient to form a belief."

The respondent interposes the objection that this is not an order involving the merits of the action, or some part thereof, but merely a question of practice resting in the discretion of the court, and is not appealable.

This portion of the answer purports to be a denial of all the allegations in the complaint not expressly admitted. The remaining part of the answer admits but a few of the material allegations of the complaint. If the portion of the answer in the form of a general denial is good, it puts at issue all the remaining allegations of the complaint material to plaintiff's right to recover, and not only compels the plaintiff to prove the issues on his part, but permits the defendant to disprove them; if it is stricken out, the defendant is deprived of his right to disprove the allegations, and they are taken as admitted against him. The order striking out, therefore, goes to the merits of the action, and is appealable. Starbuck v. Dunklee, 10 Minn. 173 (Gil. 136).

Upon the merits of the motion we think it should not have been granted.

The statute provides that the answer shall contain (1) a denial of each allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. Gen. St. p. 460, § 79. The statute prescribes

[8] Dissenting opinion of Wilson, C. J., omitted.

no particular form of denial, nor does it make any distinction between general and specific denials.

The sufficiency of a general denial, where it puts in issue the substance of the allegations to which it is addressed, cannot now be questioned. This form of general denial has been in general use by the profession since the adoption of the Code, and has been repeatedly recognized and sustained by this court. Bond v. Corbet, 2 Minn. 248 (Gil. 209); Caldwell v. Bruggerman, 4 Minn. 270 (Gil. 190); Starbuck v. Dunklee, 10 Minn. 173 (Gil. 136); Montour v. Purdy, 11 Minn. 401 (Gil. 278).

The certainty required in pleading is that the allegation must be so certain and explicit as to exclude ambiguity, and make the meaning of the averments clearly intelligible. Gould, Pl. c. 4, § 24, p. 180.

Any language in an answer, therefore, which clearly indicates the allegations which the pleader intends to controvert, and denies with certainty the substance of such allegations, is sufficient.

If a complaint alleges a fact which is qualified by a particular intention, or by its connection with other facts alleged in the pleading there is no reason why the simple fact may not be admitted, and the qualifying facts or circumstances be denied; nor do we see any reason why, in case of an allegation embracing a fact and a qualifying intention, a general denial of the allegation, except as afterwards admitted, followed with an express admission of the simple fact, is not sufficient to put in issue the intention alleged, and is not sufficiently definite and certain. If the legal effect of express statements or admissions is to qualify or deny any of the allegations in the complaint, it is no objection to the answer that such effect is not expressly stated in the answer. The answer in this case purports to deny each and every allegation in the complaint, except as afterwards stated, admitted, or qualified in the answer. If there is no ambiguity in what is afterwards stated, admitted, or qualified in the subsequent portion of the answer, the pleading is sufficiently certain. The statements and admissions in the answer are express and unambiguous, and there can be no reasonable doubt as to what the pleader intended to state and admit.

We are therefore of opinion that the answer is sufficiently

definite and certain as to the portions of the complaint which the pleader intended to controvert.[9]

The question then remains whether the denial in the answer is sufficient in form to put in issue the portions of the complaint which it purports to deny. The language of a general denial, considered in reference to the allegation it purports to deny, may be such as to be a denial in form only, and not in substance. An instance of this kind is found in the case of Dean v. Leonard, 9 Minn. 190 (Gil. 176), or it may be uncertain, as in Starbuck v. Dunklee, 10 Minn. 168 (Gil. 136). But the case under consideration differs from these. The defendant in this case "denies each and every statement and averment, and very part of the same, in said amended complaint as therein stated or otherwise." This, we think, is a denial, in form and substance, of the allegations controverted. It would be unreasonable to suppose that the pleader intended to deny a portion of a sentence composing an allegation in the complaint, and the only reasonable construction, to give the language any effect, is that he intended to deny everything which in legal effect was embraced in the allegation. The respondent also urges that "the denial, when coupled with the words immediately preceding, is bad. The defendant shows to this court, and states[10] *that* he denies," etc. We italicize the word "that" for our own convenience. Whether the principle embraced in this objection is true or not, we need not determine. The language of this answer is: "The separate answer of said defendant * * * shows to this court and states: *First,* the said defendant denies," etc. The rule contended for by the respondent of course would not be applicable here.

The order granting the motion to strike out is reversed.

[9] And so in Burley v. German Am. Co., 111 U. S. 216, (1884), under N. Y. Code. Such a denial may be so uncertain as to be open to a motion to make more specific, Long v. Long, 79 Mo. 644, (1883). But see Dezell v. Fidelity Co., 176 Mo. 253, (1903), that such a denial is too uncertain to raise any issue.

[10] See Wadleigh v. Marathon Co., 58 Wis. 546, (1883), sustaining a denial in much the same form, and so in Kirshbaum v. Eschman, 205 N. Y. 127, (1912).

COLLART v. FISK.

Supreme Court of Wisconsin, 1875. 38 Wis. 238.

The action is to forclose a mortgage on real estate, executed by the defendant Coppersmith to the plaintiff, to secure the payment of a promissory note of even date made by the former. The note is dated June 23d, 1871, and is for $200 payable in five years, with interest payable annually. The breach of condition alleged is the nonpayment of interest for three years. The complaint contains an averment that the defendants Cormier and Fisk "have or claim to have some interest in or lien upon the said mortgaged premises or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of the said mortgage." It is also alleged that the mortgage was duly recorded in the proper office, July 17th, 1871.

The defendant *Fisk* answered separately, denying "that he has any knowledge or information sufficient to form a belief that any allegation of said complaint is true, except the allegation that this defendant has or claims some interest in or lien upon the so called mortgaged premises." To this answer the plaintiff interposed a demurrer, alleging that it failed to state facts sufficient to constitute a defense or counterclaim; and he appealed from an order overruling the demurrer.

LYON, J. On the authority of Hathaway v. Baldwin, 17 Wis. 616, it must be held that the answer of the defendant *Fisk*, so far as it relates to the execution, recording and ownership of the mortgage described in the complaint, is insufficient. But a defendant who is a subsequent incumbrancer may litigate the questions as to whether anything is due on the debt secured by the mortgage, and if so, how much; and, as a matter of course, he may deny in his answer that anything is due, or that there is as much due thereon as the plaintiff claims.

The reasons why such subsequent incumbrancer may not deny the execution and recording of the mortgage by denial of knowledge or information thereof sufficient to form a belief, are, that the record is made and kept for the purpose of giving that information; that it is open to all, and constructive notice to all; and that its correctness and authenticity are to be presumed. For these reasons it is held that no person can be heard to plead ignorance of the record so far as it effects his own title

or property. But these reasons do not apply to the defense that nothing is due, or that less than the plaintiff claims is due on the mortgage debt. There is no record to show payments thereon, and a subsequent incumbrancer has no constructive notice on the subject. Hence no good reason is perceived why he may not deny the allegations of the complaint in respect to the amount due on the mortgage debt, just as he may deny any other material allegation therein, of which he is not presumed to have knowledge and concerning which he is ignorant, by a denial of knowledge or information thereof sufficient to form a belief. The cases cited by the learned counsel for the appellant in support of the opposite doctrine have been examined, and we think they fail to sustain the position of counsel.

We conclude that the answer of the defendant *Fisk* contains a sufficient denial that there has been any breach of the conditions of the mortgage, and that the demurrer thereto was properly overruled.[1]

On motion for rehearing—

LYON, J. The principal argument of the learned counsel for the appellant in support of his motion for a rehearing is based upon the proposition that an answer is bad which purports to be a defense to the whole cause of action stated in the complaint, but which, in fact, only goes to a part of the cause of action. Hence, it is claimed that the answer of the general denial in this case, in the form in which such denial is made, not being a denial of the averments concerning the execution and recording of the plaintiff's mortgage, is not a good answer to any other material averment in the complaint. One difficulty with the argument is, that the denial that any sum was due on the mortgage at the commencement of the action, goes to the whole cause of action, and not merely to a part of it, and hence is not within the rule of pleading upon which the counsel relies. The fault in the argument seems to be, that the proper distinction is not made between a denial of part of a cause of action, and a denial of a portion only of the facts stated in the complaint, the averments denied being essential, however, to the plaintiff's right to recover.

1 And so in Bennett v. Leeds Mfg. Co., 110 N. Y. 150, (1888). But a denial of information only is not sufficient to raise an issue. Manny v. French, 23 Ia. 250, (1867).

We do not care to enlarge on the subject, and will content ourselves with a statement of the rule applicable to the case. We hold that the general denial puts in issue every material averment in the complaint, which may be denied in that manner, although there may be other material averments therein not specifically denied, and not reached by the general denial. Sanford v. McCreedy, 28 Wis. 103, and Ewen v. The C. & N. W. Ry. Co., *vide post,* 613, are illustrations of the application of this rule. It is not perceived that the cases of Babb v. Mackey, 10 Wis. 371, and Fitzsimmons v. City Fire Ins. Co., 18 id. 234, conflict with this rule. The question as to the effect of a general denial was not in those cases.

We are of the opinion that the answer admits that the defendant *Fisk* is a subsequent incumbrancer. It admits (or, what is equivalent thereto, it excepts from the general denial) the allegation that Fisk has or claims an interest in the mortgaged premises, and does not assert that such interest is prior to the plaintiff's mortgage. We understand this to be an admission of the whole of the allegation, that is, an admission that such interest is subsequent to the mortgage.

Hathaway v. Baldwin, 17 Wis. 616, is not in conflict with the views expressed in the former opinion. In that case the court was asked to exercise its discretion, and permit the defendants (who were subsequent incumbrancers) to come in and answer after default. The answer tendered denied (among other things) any knowledge or information sufficient to form a belief as to the truth of the averment in the complaint of the amount due on the mortgage. This seems to have been the only averment therein which the proposed answer would put in issue. The opinion does not refer to the subject, but this court held, in effect, that the refusal of leave to interpose such answer was not an abuse of discretion. Doubtless, the case was correctly decided. * * *

Motion denied.

WAYLAND v. TYSEN.

Court of Appeals of New York, 1871. 45 N. Y. 281.

Appeal from an order of the General Term of the Supreme Court in the second judicial district, affirming an order of the Special Term, striking out an answer as sham, and ordering judgment for the plaintiff.

The answer was as follows:

The defendant, David J. Tysen, denies each and every allegation in the complaint of the above plaintiffs in this cause contained.[2]

The motion to strike out this answer as sham was based upon the affidavits of the plaintiffs and others strongly tending to show its falsity.

GROVER, J. * * * The entire answer of the defendants was struck out. It was a general denial of the complaint. It was verified by the defendant before service in the manner required by the Code when the complaint is verified. The motion to strike it out was made upon affidavits tending to show its falsity, and the court arriving at this conclusion, made the order striking it out as sham. The Code (§ 152) provides that sham and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the court may in their discretion impose. This answer is the equivalent of and substitute for the general issue under the common law system of pleading. It gives to the defendant the same right to require the plaintiff to establish by proof all the material facts necessary to show his right to a recovery as was given by that plea. Under the common law system, the general issue could not be struck out as sham, although shown by affidavits to be false. (Broome Co. Bank v. Lewis, 18 Wend. 565.) This was not upon the ground that a false plea was not sham. That was always so regarded, but upon the ground that a party making a demand against another through legal proceedings was required to show his right by common law evidence, and that *ex parte* affidavits were not such evidence. The court, under that system, exercised the power of striking out pleas setting up affirmative

[2] The caption to this answer, the signature of counsel and the affidavit verifying the same have been omitted.

defenses as sham when shown by affidavits to be false, but not where the party verified such plea by affidavit. (Stewart v. Hotchkiss, 2 Cow. 634.) It has been claimed, and the claim somewhat sanctioned by the Supreme Court, that these rules have been changed by section 152 of the code. That by this all distinctions in striking out answers between such as merely deny the allegations of the complaint either generally or specifically, and those setting up affirmative defenses, have been abolished. This question must be regarded as original in this court, notwithstanding the claim that this construction was adopted in The People v. McComber (18 N. Y. 315). A close examination of this case shows that this point was not involved. It is true that an opinion sustaining the construction contended for was given by Strong, J.; but the case shows that Judges Denio and Harris dissented from this opinion, although concurring in the affirmance of the judgment upon the ground that the point was not involved. This case cannot, therefore, be regarded as an authority for the construction insisted upon. The section in question simply confers power upon the court to strike out sham and irrelevant answers and defenses. This power the court, as we have seen, possessed and exercised under the pre-existing laws. For reasons deemed satisfactory it was not extended to the general issue. When this was interposed as a defense the party had a right to a trial by jury. This right is secured to him by section 2, article 1, of the Constitution. This right could not be taken away by simply changing the name from that of general issue to that of general denial. We have seen that the latter is the substance for and the equivalent of the former, so far as to require proof by the plaintiff of all the material facts showing his right of recovery. This is an argument tending to show that the Legislature, in the passage of the section in question, only intended to sanction the existing practice, and not to confer any new power upon the court.

Under the construction claimed, there is nothing to prevent the trial of this or any other issue upon affidavits. The moving party has only to satisfy the court by a preponderance of evidence of this character of the falsity of the plea, and it may be struck out, although specifically verified by the party interposing it, notwithstanding such party may insist upon his right to a trial, when he can have the privilege of cross-examining the affidavits, and having their credibility passed upon by a jury.

I think that by the true construction of the section, the power of the court to strike out pleadings was not extended beyond what it was under the pre-existing law. That we have seen extended only to such affirmative defenses as were not verified by the oath of the defendant or other equivalent evidence. It may be said that a motion to strike out a pleading is not the trial of an issue joined thereby. This is literally true, but in substance the difference is scarcely perceptible. It calls for a determination whether the pleading be true or false; and if found false and struck out, the defendant is as effectually deprived of any benefit therefrom, as if found false upon a verdict, although he can derive no benefit from a failure to find it false, for the plaintiff will still be entitled to a trial of the issue. It will thus be seen that all the plaintiff hazards by the motion is the costs, while the defendant is precluded by an adverse result. It may be said that the power claimed will only be exercised in clear cases, where it is manifest that the desire of the defendant is only for delay, and that he is practicing a fraud for this purpose by putting a falsehood upon record. Concede the construction of the section claimed by the respondent, as we must to sustain the order, and its exercise cannot be confined to this class of cases. The judgment of the court must be exercised upon the affidavits, and if satisfied of the falsity of the pleading, although sustained by opposing affidavits, it becomes a duty so to decide by granting the motion. It is in the power of the plaintiff, in every case, as was done in this, to preclude the defendant from interposing either a general denial or a denial of specific facts by verifying his complaint. Thus he can prevent such answer, unless from the affidavit of the defendant it shall appear that it was interposed in good faith. The Code, it is true, allows the defendant to deny any knowledge or information[3] sufficient to form a belief, and thus put the fact in issue. If he verifies this, what right has the plaintiff to strike out his answer by producing affidavits showing the truth of such facts of which the defendant was ignorant at the time of putting in his answer. Such affidavits fail entirely to show that the answer was put in

3 But a denial of knowledge or information sufficient to form a belief as to matters clearly within the personal knowledge of the pleader may be stricken out as sham or frivolous, Kirchbaum v. Eschman, 205 N. Y. 129, (1912).

in bad faith, or that it was false; and yet this is the very class of cases where the court will be most frequently called upon to strike out the answer. If the defendant commits perjury in verifying the answer, as he must have done in this case, if he knew the allegations of the complaint were true, he ought to be prosecuted therefor. If plaintiffs, who complain of injury from delay by the fraudulent interposition of false answers, would perform the duty incumbent upon every good citizen, to prosecute those known to be guilty of perjury, they would effectually stop such an abuse. I am satisfied that the intention of the Legislature in enacting the section of the Code under consideration, was not to confer any new power upon the court, but to give legislative sanction to that exercised under the existing law. The order appealed from must be reversed, and an order entered denying the motion; but as the practice under which it was made had the sanction of some reported cases in the Supreme Court, it should be without costs to either party.

Order reversed.

WALL v. BUFFALO WATER COMPANY.

Court of Appeals of New York, 1858. 18 N. Y. 119.

ROOSEVELT, J. The water company are sued for alleged negligence in omitting to fence in or light a street excavation in the city of Buffalo, in consequence of which, it being very dark, the plaintiff, as he alleges, fell in and sustained very serious injury. He claimed $5,000 damages. A verdict was found in his favor for $1,000, and judgment rendered for that amount, which the general term of the Buffalo Superior Court, overruling the defendant's exceptions, affirmed.

It is contended by the company that on the evidence the injury sustained might have arisen from other causes, and that there was no proof that the plaintiff, whatever might have been his injuries, fell into the ditch which the Water Works Company had dug. This objection was met at the trial, and so the judge decided, by the position taken by the plaintiff's counsel, that the pleadings admitted the fact of falling into the ditch. A nonsuit was denied on that ground, and the ruling to that effect governed

all the subsequent proceedings. It was duly excepted to at the proper stage of the trial, and the defendants had a right to the benefit of the exception without repeating it at every step. And as the whole trial was conducted afterwards upon the assumed admission, the verdict of course must be set aside if that assumption was erroneous.

No express admission is pretended. But the Code, it is said, declares (§ 168) that every material allegation of the complaint, not controverted by the answer, "shall, for the purposes of the action, be taken as true." Now the complaint expressly avers, not only that the plaintiff fell into the ditch, but that he fell into it in consequence of the company's negligence in omitting to place any light, fence, or other protection to guard against accident. The answer denies that the ditch was left unguarded, "so that persons using reasonable care" would fall into it; in other words, it distinctly controverts the charge of negligence. It then proceeds with a further denial "that the plaintiff, without any fault or want of care on his part,[4] did fall therein." And the question is, does this averment put in issue the plaintiff's want of negligence, or the plaintiff's falling into the ditch, or both.

The denial as to the falling into the ditch, it must be conceded, is not very specific; and under the Code, as it stood originally, would probably have been pronounced insufficient. "A specific denial of every allegation of the complaint" was then required (§§ 149, 169), and every allegation, "if not controverted as prescribed," it was declared, should be "taken as true." In 1852, however, the words "not specially controverted" were superseded by the words "not controverted," and the words "specific denial" by the words "general or specific denial." The present action was commenced in 1855. The answer, therefore, is to be governed by the amended Code. And as it contains a "general denial" of the plaintiff's allegation of his having fallen into the ditch in the manner described, that

[4] The complaint alleged that plaintiff "fell into said ditch, etc. without any fault or want of care on his part."

While in New York lack of contributory fault on the plaintiff's part is an essential part of his case, an express allegation to that effect is unnecessary, see note to Potter v. Ry., 20 Wis. 533, ante p. 342.

allegation in all its parts, "for the purposes of the action," must be deemed to have been "controverted."

We consider the answer, notwithstanding, as open to criticism. It is a species of negative pregnant. But the plaintiff, if dissatisfied with the vagueness and uncertainty of the pleading, had his remedy by motion. Not having applied, at the proper time, for an order to compel the defendants to be "more definite and certain," he is presumed to have been satisfied with the pleading as it stood, especially as he knew that, under the present system, it was made "the duty of the court to construe pleadings liberally," and of course not to assume that parties, by implication, intended to admit when they could safely deny their adversary's case.

The point has been decided in this court, in a case which has not been reported here. At the March term, 1855, it had under review the action of Lawrence v. Williams, upon an appeal from a judgment of the Superior Court of the city of New York, which is reported in 1 Duer 585. It was an action in the nature of ejectment, to recover the possession of certain premises which had been demised to the defendant, on the ground that he had broken the covenant not to underlet without the consent of the lessor. The defendant answered, denying that "in violation of the said covenant, *and without the consent of said plaintiff*, he had underlet the said premises." On the trial the plaintiff gave in evidence the lease containing the covenant not to underlet, and a general clause of reentry, and rested. The plaintiff had a verdict on the ground that the answer did not deny the fact of underletting, and the judgment was affirmed at a general term. The court held that the answer admitted the underletting, and that it took issue merely upon the allegation that such underletting was without the consent of the plaintiff. On the appeal here, this court reversed the judgment. The opinion which prevailed was prepared by Gardner, then Chief Judge. It has not been furnished to the reporter; but, on inquiry of that officer, I find that he entered in his minutes the conclusion to which the court arrived, as follows: "The plaintiff should have proved the underletting. The answer, although it contains a negative pregnant, puts in issue the subletting." The case is

in principle precisely like the present, and must determine the judgment we have now to render.[5]

The judgment of the Supreme Court must be reversed and a new trial awarded.

DENIO, J. (*dissenting.*) To maintain the action, it was necessary for the plaintiff to aver and prove that he fell into the excavation which the defendant had made in the street, and it was also essential that the facts should show that he was not himself chargeable with negligence or any want of proper care. Both particulars are alleged in the complaint in separate propositions. The defendant had a right to deny the matters stated in the complaint generally or specifically. (Code, § 149.) If any material allegations of the complaint was left uncontroverted in the answer, it was to be taken as true. (§ 168.) If the plaintiff verifies the complaint by his oath, the defendant must verify the answer in the same way. (§§ 156, 157.) Under the permission to put in a general denial, the defendant might have answered in a way which would be equivalent to the for-

[5] Compare Maxwell, J., in Harden v. A. & N. R. R. Co., 4 Neb. 521, (1876): * * *

"Without considering the admissions contained in the answer, is there any denial therein, that the injury complained of was committed by the defendant? We think not. It is denied that the "defendant negligently, carelessly, and wantonly ran its engine or locomotive and train of cars over, or against the said mare of the said plaintiff," but this is a mere denial of negligence on the part of the defendant, and not a denial that the defendant occasioned the injury complained of. "A defendant must answer the charge directly, without evasion, and not by way of negative pregnant." 1 Vansantvoords, Eq., 204. Moaks Van Sant, Pl., 814. Baker v. Bailey, 16 Barb., 56; Fish v. Redington, 31 Cal., 194; Robbins v. Lincoln, 12 Wis., 8. A denial must be direct and unambiguous, and must answer the substance of each direct charge; and such facts as are not denied by the answer for the purposes of the action, are to be taken as true. This requirement of the statute is not designed to prevent the defendant from denying such facts in the petition, as he believes to be untrue, but to prevent the introduction of fictitious issues; and while denials must be positive and direct, the verification need only be, that the defendant believes the facts stated in the answer to be true.

There being no denial in the answer that the defendant committed the injuries complained of, no proof of those facts was required. The court therefore erred in instructing the jury to find for the defendant." And so in Terley v. Shirley, 43 Cal. 369, (1870); Harris v. Shontz, 1 Mont. 212, (1870).

mer plea of the general issue, if he could swear to such a defense; but because this could not be safely done, or for some other reason, the defendant in this case undertook to answer specifically. It was, therefore, necessary for the defendant to answer whether the averment that the plaintiff had fallen into the ditch was true or to deny sufficient knowledge or information upon that point to form a belief. (§ 149.) No want of knowledge or information is stated in the answer, and if the defendant has failed to deny this allegation, it is left uncontroverted. The answer avers that the plaintiff did not fall in without fault or want of care on his part. This is not a denial that he did fall in. It is an implied admission that he did, but that it was not done under the circumstances alleged. But it is enough for the plaintiff's purpose that it is not a denial. To show it is not a denial of the precise fact which the defendant was called upon to answer, let us suppose that the action was against a natural person who happened to be present at the accident which befell the plaintiff; and suppose, further, that the case was such that he might well have entertained the belief that the plaintiff was wanting in circumspection. The plaintiff, desirous of availing himself of the defendant's admission of the principal fact, and being, we will suppose, unable to prove it in any other way, swears to a complaint containing the allegations in the one before us. The defendant might put in and swear to the answers contained in this record, without making the admission required, and without exposing himself to be questioned for perjury. If indicted for falsely swearing that the plaintiff did not fall into the excavation, when in truth he saw him so fall with his own eyes, he could say with perfect truth that he did not swear to the contrary; that he did not, on oath, deny the general fact of his falling in at all, but that by a strong implication he admitted it.

But it is said the plaintiff should have moved to compel the defendant to make his pleading more definite and certain, by amendment, according to § 160. This depends upon the consideration whether the answer as it stands is, in any respect, indefinite or uncertain. I think it is neither. The defendant had a clear right to waive any controversy respecting the simple fact of the plaintiff's fall, and to limit the issue to the question whether he was at the time in the exercise of proper care. This he has done in language quite appropriate to set forth that line

of defense. It may very well be that those concerned in defending the action misunderstood the effect of the answer. If so, it was for the defendant to ask leave to amend it upon terms. The plaintiff is not to be charged with laches, because he understood it correctly and acted upon that understanding.

It is essential to apply to pleadings, under the Code, the common principles of literary interpretation. The disuse of established forms and technical language has led to much vagueness and uncertainty. But pleadings are still, in terms, required to be in ordinary and concise language. To secure a compliance with this direction, we must apply to their construction the usual principles of criticism. Conformably with these principles, it is impossible to say that a denial that a person did a thing under particular circumstances is a denial that he did it at all. I am, therefore, in favor of the affirmance.

Judgment reversed.

LEFFINGWELL v. GRIFFING.

Supreme Court of California, 1866. 31 Cal. 232.

Plaintiff recovered judgment in the court below, and defendant appealed from the judgment and from an order denying a new trial.

SHAFTER, J. The complaint is in two counts. The first count alleges that the defendant promised the plaintiff if he would find a purchaser for certain real estate in San Francisco, that the defendant would pay the plaintiff for his services the excess of the purchase money over and above the sum of sixty-two thousand dollars; that the plaintiff procured F. H. Waterman to buy at sixty-five thousand dollars, which sum the defendant had actually received.

The second count is for three thousand dollars, as so much money had and received by the defendant to the plaintiff's use. No allusion is made to Waterman or the purchase money paid by him, or to the sixty-five thousand dollars, or to any feature of the special contract. The count is, in short, for money had and received, in the most general form. No bill of particulars was asked for, nor was any filed.

Issue was well taken on the first count, but to the second count, there was no response. The only passage in the answer that can be claimed to have any reference to that count is this: "He denies that he received three thousand dollars in gold coin, parcel of the sixty-five thousand dollars, to and for the use of the plaintiff." This denial is bad for two reasons: First, The count does not charge that the three thousand dollars sued for was parcel of the sixty-five thousand dollars, or of any other sum, but three thousand dollars, absolutely and without clog.[6] The traverse is, therefore, pregnant with an admission that three thousand dollars had been received as charged—that is, three thousand dollars disconnected from the circumstances named in the denial, and spoiling its pith. Second, the traverse is vitiated for another but kindred reason. The denial is that the three thousand dollars was received in gold coin. That involves an admission that three thousand dollars was received in either one of the two other forms of lawful money, and therein it denies what was non-essential and admits all that was essential to a recovery.[7]

Judgment affirmed.

SCHAETZEL v. GERMANTOWN INS. CO.

Supreme Court of Wisconsin, 1868. 22 Wis. 412.

Action on a policy of insurance. After judgment against defendant by default, it obtained an order setting aside the judgment and granting leave to file an answer; the plaintiff appeals from the order. The character of the answer proposed will sufficiently appear from the opinion.

PAINE, J. If the answer which the defendant asked leave to file, set forth any defense or presented any material issue, we should not reverse the order allowing it to be filed. For, what-

6 That a denial of an essential fact omitted from the complaint does not aid the complaint, see Scofield v. Whitelegge, 49 N. Y. 259, (1872), ante p. 276.

7 For an illustration of a negative pregnant resulting from a denial in the conjunctive instead of in the disjunctive, see White v. East Side Mill, 81 Ore. 107, (1916).

ever might be our conclusions upon the weight of the testimony presented by the affidavits, we could not say there was such an abuse of discretion as to justify reversing an order of this character.

But the answer states no defense, and offers no material issue. The denials are all liable to the objection that they are negatives pregnant. The complaint avers that on a particular day the property was all destroyed by fire. The answer denies this in the very words of the complaint. Such a denial is a negative pregnant with the admission that it may have been all destroyed on some other day; or that a part may have been destroyed on the day named. Such denials have been always held insufficient. Baker and others v. Bailey, 16 Barb. 54; Salinger v. Lusk, 7 How. Pr. 430; Davison v. Powell, 16 id. 467. Many other authorities to the same effect might be cited.[8]

The denial that an action had accrued to the plaintiff, is a denial of a mere legal conclusion, and tenders no material issue. The denial of sufficient knowledge or information to form a belief as to the alleged loss by fire, is not sufficient after the answer has impliedly admitted that the proofs of loss were furnished as the policy required. This is impliedly admitted, because the denial is only that the conditions of the policy were complied with in that respect "as stated in the complaint." The complaint alleges that the proofs of loss were filed with the secretary of the company on the 31st day of March, 1866. The denial is therefore only that they were filed on that day, which, in accordance with the rule above stated, is pregnant with the admission that they were filed on some other day, within the time required. Where, then, an answer must be taken to admit that the proofs of loss were furnished as the policy required, a denial of sufficient knowledge or information to form a belief as to loss, ought not to be held to put it in issue. It appears on the very face of the answer, in such case, that they had the information.

The policy contained a provision to the effect that it should

[8] Acc. Hanson v. Lehman 18 Neb. 564, (1886), time; Robbins v. Lincoln, 12 Wis. 1, (1860), amount; Lynd v. Picket, 7 Minn. 184, (1882), value.

But where a descriptive allegation is material, as the date or language of a written instrument, a denial in the precise words of the instrument is sufficient, Higgins v. Graham, 143 Cal. 131, (1904).

cease in case the assured should make any other insurance on the property without the written consent of the company, endorsed on the policy "or otherwise acknowledged by them in writing." The answer attempts to set forth a violation of this provision by one of the former owners of the property and policy. But it is clearly defective in substance. It alleges that such other insurance was effected "without the written consent of the said Germantown Farmers' Mutual Insurance Company, the defendant herein, endorsed upon the said policy of insurance, in said complaint set forth, or otherwise acknowledged by the said last mentioned company, in writing *on said policy of insurance.*" It is obvious from the provision of the policy, that the consent would be perfectly good, if made in writing, whether on the policy or any other separate paper. Yet the answer only avers a failure to give consent in writing on the policy. This is also a negative pregnant with the admission that the consent may have been given in writing on a separate paper, and fails to show any forfeiture.

The suggestion of counsel that the words "on said policy of insurance" could be rejected as surplusage, is wholly inadmissible. Those words limit and qualify the allegation in the most material manner. To reject them enlarges its meaning, and makes it say what now it does not say. The court cannot take such liberties with the deliberate statements in pleadings.

For these reasons, the order appealed from must be reversed. But as it is possible that the defendant may amend the answer consistently with the facts, it will be reversed without prejudice to a new application, if the party should desire to make one.

Ordered accordingly.

ELECTRICAL ACCESSORIES CO. v. MITTENTHAL.

Court of Appeals of New York, 1909. 194 N. Y. 473.

Hiscock, J. The answer of the appellants, consisting of denials, seems to have been stricken out as frivolous at the Special Term upon one or perhaps both of two theories. One of these was that the denials relied on were subject to the vice of being or containing a negative pregnant, and the other one was that

the allegations of the complaint which the answer purported to deny were not material to respondent's recovery, and that, therefore, no sufficient issue was raised.

We think that the order appealed from cannot be sustained on either theory, and must be reversed.

The respondent brought this action to recover one thousand dollars, part consideration for the assignment and transfer to the appellants of certain rights in and to an invention for improvements in portable electric fountains and under letters patent granted therefor. One thousand dollars was paid on the assignment, and the balance of four thousand dollars, as alleged in the complaint, was to be paid "by the payment of five per cent upon the gross sales of said fountains until full amount of four thousand ($4,000) dollars shall have been paid." Then followed the allegations which are important on this appeal and which were as follows: "Upon information and belief that large numbers of said fountains have been sold (meaning by defendants,) the exact amount of which sales plaintiff is unable to state, but plaintiff alleges, upon information and belief, that between the date of said assignment and the 25th day of May, 1908, the gross sales of said fountains amounted to no less than Twenty Thousand ($20,000) Dollars." And then in paragraph VI followed a prayer for judgment of one thousand dollars, being five per cent upon said gross sales.

The answer, for its only important denial, being the one under consideration, "denies each and every allegation contained in paragraphs V and VI of the plaintiff's complaint herein."

The allegations in paragraph V of the complaint which appellants denied were material ones. They did not state a mere conclusion of the amount due to the respondent, that being contained in the following paragraph. They stated a fact the existence of which was clearly a condition precedent to any right of recovery, namely, that appellants, being bound to pay five per cent upon their gross sales of fountains, had sold a certain number thereof, and that, therefore, their obligation had attached and respondent was entitled to recover. Therefore, the denial of these allegations, if sufficient in form, raised a material issue, and on this point the decision below was clearly wrong.

The denials employed by the appellants were sufficient in

form, and were not subject to the criticism of embodying a negative pregnant.

A negative pregnant has been defined by Pomeroy in his treatise, Pomeroy's Code Remedies, section 618, as a denial "pregnant with an admission of the substantial fact which is apparently controverted; or, in other words, one which, although in the form of a traverse, really admits the important fact contained in the allegation." A careful inspection of the allegations of the complaint shows that appellants' denial was not in the form thus described. Respondent's complaint at the point in question really contained two allegations. It alleged that appellants had sold "large numbers of fountains, * * * the exact number of which sales plaintiff is unable to state," and then it further alleged upon information and belief that between certain dates the gross sales of said fountains amounted to not less than a certain amount, which was equivalent to saying that they were equal to a certain amount.

The Code of Civil Procedure authorized appellants to make "a general or specific denial of each material allegation of the complaint controverted by the defendant" (Section 500), and accordingly they did deny "each and every allegation" above quoted. We utterly fail to see how this denial was "pregnant with an admission of a substantial fact," or how it "really admits the important fact contained in the allegation." It denied, first, that defendants had sold large quantities of the fountains and then it also denied that the amount of such sales was not less than, that is, equal to, a certain amount. These denials compelled the respondent to prove its allegations.

If this answer really was in any respect vague or uncertain the respondent had the right to compel a correction thereof by proper preliminary motion, and having failed to make this the answer is to be construed most strongly against it. (Stuber v. McEntee, 142 N. Y. 200, 206; Wall v. Buffalo Water Works Co., 18 N. Y. 119.)

The orders of the courts below should be reversed, with costs in all courts, the motion to strike out the answer and for judgment denied, with costs, and the question certified to us answered in the affirmative.

Ordered accordingly.

LOEB v. WEIS.

Supreme Court of Indiana, 1878. 64 Ind. 285.

PERKINS, J.[9] John M. Weis & Co. were a mercantile firm, largely indebted. Said firm sold and transferred to Elias Weis their entire stock of goods, notes, and accounts; and, in consideration of such sale and delivery, said Elias Weis promised the said John M. Weis & Co., by their firm name, to pay to the creditors of said firm all claims and demands existing against it.

Said Weis & Co. owed Loeb et al., the appellants, the sum of three hundred and thirty-seven dollars and eighty-five cents, which they demanded of Elias Weis, and which he failed to pay, etc.

This suit is by said appellants, against said appellee, on his promise to Weis & Co. to pay their creditors. The complaint states a cause of action. Miller v. Billingsly, 41 Ind. 489, and cases cited; Haggerty v. Johnston, 48 Ind. 41; See Crim v. Fitch, 53 Ind. 214.

Answer in three paragraphs: 1. General denial; 2. Payment by Weis & Co., the original debtors; and, 3. "That the goods, notes and accounts, etc., alleged in this complaint to have been sold by said John M. Weis & Co. to defendant, were transferred and delivered to him to be disposed of as follows, to-wit: for the purpose of being appropriated by defendant to the payment, so far as they might go, of the debts which had been contracted by a prior firm, composed of said John M. Weis and Horace Case, one William R. Kennedy having succeeded to the rights and liabilities of said Case. * * *

Demurrer to the third paragraph of answer for want of facts overruled, and exceptions entered.

We briefly notice the question presented.

The court did not err in overruling the demurrer to the third paragraph of answer. The suit was upon an alleged promise to do a certain thing. On proof of substantially such a promise, the plaintiff's right of recovery depended.

The third paragraph of the answer averred that the promise, on the occasion alleged in the complaint, was entirely different in its terms from what the complaint alleged it to be, setting

[9] Part of the opinion omitted.

out those terms. This was an argumentative denial of the promise alleged in the complaint. The matter alleged could have been given in evidence, under the general denial. Still the paragraph of the answer contained facts constituting a defense to the action; and, while the party might have been permitted to give them in evidence under the general denial, which was pleaded, yet he had a right to plead the facts specially, and, having done so, it was not error in the court below to overrule a demurrer[10] to such special paragraph. Such is the settled law of this State.

What is said by Judge Howk, in Morris v. Thomas, 57 Ind. 316, is not in conflict with our decision on this point. He says in that case, that, "An argumentative denial is seldom 'good,' in pleading, for any purpose"; but the case does not decide that an argumentative denial may not, in any case, contain facts constituting a defense to an action.[1] * * *

Judgment affirmed.

EWEN v. C. & N. RY. CO.

Supreme Court of Wisconsin, 1875. 38 Wis. 613.

Action under sections 12 and 13, ch. 135, R. S., by the plaintiff as administrator, to recover damages alleged to have been sustained by Mrs. Kittie McCall by the death of her son, an infant about nine years of age, caused by the negligence of the defendant in operating its railway in Milwaukee, on November 23, 1872. The answer was a general denial, and a charge of contributory negligence. * * *

The defendant moved for a nonsuit, on the grounds, (1) that

10 See S. L. M. Ry. Co. v. Hinchliffs, 170 N. Y. 493, (1902), that an argumentative denial is not for that reason bad on demurrer, but may be subject to a motion to strike out, or make more specific.

1 For illustrations of argumentative denials held insufficient because not clearly inconsistent with the truth of the matter sought to be denied, see Dimon v. Dunn, 15 N. Y. 498, (1857); West v. Am. Exch. Bk., 44 Barb., 175, (1865). An argumentative denial is not admitted by a failure to traverse it, Woodworth v. Knowlton, 22 Cal. 164, (1863); Phillips v. Hagart, 113 Cal. 552, (1896).

the plaintiff had not proved that he was administrator of the deceased, and hence had shown no right to prosecute this action; and (2) that the deceased and his mother were each guilty of contributory negligence. The motion was overruled. * * * There was a verdict and judgment for the plaintiff from which defendant appealed.[2]

COLE, J. * * * The next exception arising on the record is the one taken to the ruling of the court refusing to nonsuit. It is insisted that the nonsuit should have been granted for failure to prove the representative character of the plaintiff. It is said the representative character of the plaintiff was directly put in issue by the general denial in the answer, and that therefore the plaintiff was bound to prove it in order to maintain the action. This question was considered and passed upon in Sanford v. McCreedy, 28 Wis. 103, and Wittmann v. Watry, 37 id. 238. In the former case, Mr. Justice Lyon remarks, that the general denial under the Code has no broader application than the general issue under the old system of pleading, and that all the authorities agreed that the representative character of the plaintiff was not put in issue by a plea of the general issue.[3] In Wittmann v. Watry, where the plaintiff sued as executrix, the

2 Statement condensed and part of the opinion omitted.

3 It seems well settled that at common law the appointment of an administrator was not in issue under a plea of the general issue, Thynne v. Prothero, 2 M. & S., 553, (1814):

There is some confusion as to whether the plea of "ne unques administrator" was in abatement or in bar.

For the view that it was properly pleadable in bar, see Noonan v. Bradley, 9 Wall. 394, (U. S. Sup., 1869), sustaining the joinder of such a plea with other pleas to the merits; and so in Thomas v. Cameron, 16 Wendell 579, (N. Y. Sup. 1837) in which Bronson, J., sustained the joinder of this plea with "non assumpsit" on the following grounds:

"Upon principle I think the matter was well pleaded in bar. The plea does not nor could it give the plaintiff a better writ, but it destroys the action altogether. If they are not executors, they have no right to sue in this or any other form. They have no cause of action against the defendant." See same reasoning applied in Hamilton v. McIndoo, 81 Minn. 324, (1900), where a complaint failed to allege the plaintiff's appointment as administrator de bonis non, and it was objected that this could only be taken advantage of on special demurrer for lack of capacity to sue, but it was held that because of the omission the complaint failed to state a cause of action in favor of the plaintiff.

answer contained a special denial of her representative character; and this court held that this form of denial put in issue the character in which the plaintiff sued, and that it was essential for her to prove that she was executrix. It was in the nature of a special plea in bar, as in Thomas v. Cameron, 16 Wend. 579, and Flinn v. Chase, 4 Denio 86. It is very evident that under the rule laid down and sanctioned in the above cases, the representative character of the plaintiff would be put in issue only by a special denial of that fact in the answer, and that under the general denial the defendant did not controvert it.[4] And as the representative character of the plaintiff was impliedly admitted under the form of the answer, it follows of course that the plaintiff was not obliged to prove it. It is said that this construction of the answer plainly disregards the language of the statute (sec. 10, ch. 125), and destroys the effect which it gives to a general denial. We do not understand that the statute enacts what effect shall be given the general denial in the answer. It declares what the answer shall contain, but does not state that the general denial shall be deemed to controvert in all cases every material allegation of the complaint. * * *

Judgment affirmed.

FOGLE, ADM'R v. SCHAEFFER.

Supreme Court of Minnesota, 1877. 23 Minn. 304.

The plaintiff recovered in the court below without proof of his appointment as administrator, and the defendant appealed.[5]

Berry, J. This is an action brought in the court of common pleas of Hennepin County, upon a judgment against the defendant recovered in Stark county, Ohio, by Frances Fogle, as administratrix of the estate of Lewis Fogle, deceased. The complaint alleges that, "after the recovery of the judgment, said Frances Fogle, administratrix, departed this life, and this plain-

[4] See same result in Gross v. Watts, 206 Mo. 373, (1907), apparently on the ground that the defense was in abatement. And so in White v. Moses, 11 Cal. 69, (1858); Compare Hamilton v. McIndoo, ante p. 459.

[5] Statement condensed and part of the opinion omitted.

tiff was, thereupon, to wit, on or about April 14, 1875 duly appointed and qualified, by and in the probate court of said county of Stark, as administrator *de bonis non* of the estate of said Lewis Fogle, deceased, and has since been and now is such administrator;[6] that, before the commencement of this action, this plaintiff duly filed in the probate court of said county of Hennepin a duly authenticated copy of his appointment as such administrator." For answer to the complaint the defendant "denies the same, and each and every part and portion thereof." The question in the case is whether the answer puts in issue the foregoing allegations of the complaint as to the plaintiff's character as administrator, and his right to bring this action.

The rule upon the subject involved in this question is correctly stated in Fetz v. Clark, 7 Minn. 217, as follows: "The denial, in general terms, of each and every allegation of the complaint is not confined in any case to a denial of the principal fact on which the complaint is founded, but is equivalent to a denial of each material allegation thereof, just as though the pleader had traversed the several allegations in detail." The decision in which this rule is found was made in 1862, and it was preceded by earlier decisions of this court in the same direction. Substantially the same rule is laid down in Kingsley v. Gilman, 12 Minn. 515. We are not aware that it has been departed from in this court. It is, therefore, not only a well-established rule, but we think it is a correct rule. The reasons given for it in Fetz v. Clark are quite satisfactory. See, also, Boston Relief & Submarine Co. v. Burnett, 1 Allen 410; Gott v. Adams Express Co., 100 Mass. 320. It follows that the allegations of the complaint, in reference to the plaintiff's character as administrator, and his right to bring this action, being material allegations, were put in issue by the answer in this case. * * *

Judgment reversed.

[6] It is permissible to allege the appointment of an administrator in general terms, but in case of an administrator de bonis non, the death or discharge of the original administrator is treated as a condition precedent, which must be alleged as in the principal case, Hamilton v. McIndoo, 81 Minn. 324, (1900), ante p. 459.

BEATTIE v. BARTHOLOMEW AGR'L SOCIETY.

Supreme Court of Indiana, 1881. 76 Ind. 91.

Newcomer, C.[7] This was an action by the appellee to recover damages for the loss of certain stalls and sheds situated on the fair grounds of the appellee by fire occasioned, as was alleged, by the negligence of the appellant. There was a verdict in favor of the plaintiff below, and a judgment on the verdict, over the defendant's motion for a new trial. The only error assigned is the overruling of the motion for a new trial. * * *

The remaining reason assigned for a new trial is, that no evidence was given that the plaintiff was a corporation. The argument is that it was necessary to aver this fact in the complaint, and that every fact stated in the complaint was put in issue by the general denial, and therefore there was a failure of proof. But the rule in this State is, that the general denial admits the character in which the plaintiff sues, and that the question of the plaintiff's corporate capacity must be raised by an answer of *nul tiel* corporation.[8] Hubbard v. Chappel, 14 Ind. 601;

[7] Part of opinion omitted.

[8] There is some confusion as to whether at common law the plea of nul tiel corporation was in abatement or in bar. For the view that it was a plea in bar, see Mayo v. Bolton, 1 B. & P. 40, (1797), in which Eyre, C. J., observed: * * * "The case in Brooke, Misnomer, 73 seems to put a corporation in the same situation as a natural person as to pleas in abatement; where it is said, in an action by a corporation or a natural body, misnomer of the one or the other goes only to the writ; but to say that there is no such person in rerum natura, or no such body politic, this is in bar, for if he be misnamed, he may have a new writ by the right name; but if there be no such body politic or such person, then he cannot have an action."

In Keokuk Bridge Co. v. Wetzel, 228 Ill. 253, (1907), it was held that while a plea of nul tiel corporation applied to the plaintiff was a plea in bar because it precluded any action, such a plea applied to the defendant was a plea in abatement which must state the defendant's true character. For the view that incorporation was not in issue under the general issue, and that a plea of nul tiel corporation was necessary, though it might be pleaded either in bar or in abatement, See Barton Foundry Co. v. Spooner, 5 Vt. 93, (1833); Society v. Pawlet, 4 Peters, 480, (U. S. Supreme, 1830).

For the view that incorporation was in issue under the general issue, and therefore that the plea of nul tiel corporation was unnecessary, see Bk. of Auburn v. Ward, 19 John, 300, (N. Y. 1822); and

Heaston v. The Cincinnati, etc., R. R. Co., 16 Ind. 275; Cicero Hygiene Draining Co. v. Craighead, 28 Ind. 274; The Indianapolis Furnace & Mining Co. v. Herkimer, 46 Ind. 142; The Guaga Iron Co. v. Dawson, 4 Blackf. 202; Harris v. The Muskingum etc., Co., 4 Blackf. 267; Wiles v. The Trustee, etc., 63 Ind. 206. It was not necessary to allege[9] the corporate existence of the corporation in the complaint. Emery v. The Evansville, etc., R. R. Co., 13 Ind. 143; Jones v. The Cincinnati Type Foundry Co., 14 Ind. 89; Stein v. The Indianapolis, etc., Association, 18 Ind. 237. In Harris v. The Muskingum, etc. Co., *supra*, it was said: "The name itself implies that the plaintiffs are a corporation. * * * If the plaintiffs were not authorized to sue by the name which they have assumed, the defendant could have denied their existence by a special plea." See, also, Mackenzie v. The Board, etc., 72 Ind. 189.[10]

The appellant argues that the rule announced in our decisions applies only to cases where the party sued has recognized the existence of the corporation; but the rule is not thus limited. Indeed, a party who has contracted with a corporation, as such,

so by Gray, J., in Gott v. Adams, 100 Mass. 320, (1868): * * * "The plaintiff on the trial sought to charge the defendants as a corporation. A denial of the legal incorporation of an association sought to be so charged is not matter of abatement only, but may be made by answer on the merits. Greenwood v. Lake Shore Railroad Co., 10 Gray, 373. The plaintiff did not in his writ or declaration allege in terms that the defendants were a corporation, but only that they were "company having a place of business at Boston." If this was a sufficient averment that they were a corporation, it was met and put in issue by the denial in the answer of each and every allegation in the declaration. Boston Relief & Submarine Co. v. Burnett, 1 Allen, 410. If it was not a sufficient averment of the incorporation of the defendants, this assential fact was not alleged at all, and not being alleged, was not admitted by the answer."

Sec. 1776 of the New York Code provided that in actions by or against a corporation, the plaintiff need not prove, upon the trial, the existence of the corporation unless the answer is verified and contains an affirmative allegation that the plaintiff or the defendant, as the case may be, is not a corporation. Similar statutes are found in a number of the states, e. g. Iowa, McClain's Code, 2716, 2717; Missouri, R. S., 1919, § 1415; Wisconsin, Williams M. & R. Co. v. Smith, 33 Wis. 530, (1873).

9 See Fulton Ins. Co. v. Baldwin, 37 N. Y. 648, ante p. 457.

10 Accord: Brady v. Natl. Supply Co., 64 Ohio St. 267, (1901); Montgomery v. Ry., 73 S. C. 503, (1905).

is estopped to deny the existence of the corporation at the date of the contract, by any form of answer.

We find no error in the record, and the judgment should be affirmed.

HALFERTY v. WILMERING.

Supreme Court of United States, 1885. 112 U. S. 713.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The plaintiff in error, who was plaintiff below, sued to recover damages for an alleged breach of a written contract, entered into at Chicago, for the sale and delivery of 1,000 hogs, to average 250 pounds or over, to be delivered at Plattsburg, Missouri, in the month of December, 1876, at the seller's option, at $4.50 per hundred gross weight. The contract contained the following clause:

"Each party hereby agrees to deposit one thousand dollars ($1,000) each in the Union Stock Yard National Bank for the faithful performance of the above contract, the thousand dollars to be forfeited to the party who fails to perform his part of the contract."

The petition, setting out the cause of action, alleged that "the plaintiff duly performed all the conditions upon his part to be kept and performed."

The answer stated that the defendant "denies each and every allegation in said petition, and the three several counts thereof contained as fully and to the same purpose and effect as though each special allegation were herein specifically put in issue."

On the trial it was claimed by counsel for the plaintiff that the deposit of money, specified in the contract, was not a condition precedent to the right of recovery; but that, if it was, its performance by the plaintiff was admitted upon the face of the pleadings. The court was requested so to instruct the jury, and its refusal to do so is now alleged as error.

The obligation to make the stipulated deposit rested upon each party, as one of the terms of the agreement, so that to charge the other with a default, it became necessary to allege and prove performance, or some legal excuse for nonperform-

ance. And if the National Bank, specified in the contract, refused to become the depository for the purposes of the agreement, none other could be substituted without the consent of both parties. This is the plain meaning of the stipulation. It is one the parties had a right to make; and their agreement on the subject is the law of the case.

The denial in the answer of each and every allegation in the petition would certainly seem, as far as words are concerned, to put in issue the performance in this respect, as in every other, on the part of the plaintiff, alleged in the petition.

But counsel for the plaintiff in error contends that such is not its legal effect under the Code of Iowa, which also regulates the pleading and practice in such courts as the courts of the United States sitting in that State.

By § 2715 of the Iowa Code, it is provided that "in pleading the performance of conditions precedent in a contract, it is not necessary to state the facts constituting such performance, but the party may state, generally, that he duly performed all the conditions on his part;" and § 2712 enacts that every material allegation in a pleading not controverted by a subsequent pleading shall, for the purposes of the action, be deemed true.

§ 2717 is as follows: "If either of the allegations contemplated in the three preceding sections is controverted, it shall not be sufficient to do so in terms contradictory of the allegation, but the facts relied on shall be specifically stated."

The two other sections referred to are §§ 2714 and 2716, the latter of which provides that, "a plaintiff suing as a corporation, partnership, executor, guardian, or in any other way implying corporate, partnership, representative, or other than individual capacity, need not state the facts constituting such capacity or relation, but may aver generally, or as a legal conclusion, such capacity or relation; and where a defendant is held in such capacity or relation, a plaintiff may aver such capacity or relation in the same general way."

The application of the rule prescribed in § 2717 to the cases described in § 2716, has several times been considered and adjudged by the Supreme Court of Iowa. In the most recent of them, to which our attention has been called, Mayes, Adm'r v. Turley, 60 Iowa 407, the plaintiff averred in his petition that he was the duly appointed, qualified and acting administrator of the estate, etc. The defendants' answer said, they denied each

and every allegation in said petition contained. It was held by the court that the jury should have been instructed that, the denial being insufficient, they could not take notice of it, and they should therefore consider it admitted that the plaintiff was duly appointed and qualified administrator.

So in Stier v. The City of Oskaloosa, 41 Iowa 353, it was held that a bare denial, in the answer, of the averment in the petition, that the defendant was a corporation, does not put that fact in issue.

To the same effect are the following cases: Coates v. The Galena and Chicago Union Railroad Co., 18 Iowa 277; Blackshire v. The Iowa Homestead Co., 39 Iowa 624; Gates v. Carpenter, 43 Iowa 152.

No distinction can be drawn between the application of the rule to the cases mentioned in § 2716 and that specified in § 2715; and upon such a question we feel bound to adopt the construction of the State Code which has been established by the decisions of the Supreme Court of Iowa.

It follows, therefore, that the Circuit Court erred in its instruction to the jury that the alleged performance, on the part of the plaintiff below, of the condition of the contract which required a deposit of money in the Union Stock Yard National Bank, was a matter of issue and requiring proof; and in not instructing them, as requested by the defendant, that it was to be taken as a fact without proof, upon the admission in the pleadings.[1]

Judgment of the Circuit Court reversed.

[1] And so in Nat'l Surety Co. v. Queen City Land Co., 63 Cal. 105, (1917), under same provision as § 533 N. Y. Code.

SECTION 2. NEW MATTER.

I. *In Abatement.*[1]

DUTCHER v. DUTCHER.

Supreme Court of Wisconsin, 1876. 39 Wis. 651.

Action for divorce, on the ground of adultery. The answer was a general denial.[2]

RYAN, C. J. We do not understand the appellant's adulterous intercourse with his paramour to be questioned on this appeal. We understand his counsel to rest the appeal on two positions: first, that the respondent is not a resident, within the statute; and, second, that she had discovered the adulterous cohabitation of the appellant more than three years before suit brought. * * *

We are, therefore, of opinion that the respondent was in no sense a resident of this state within the meaning of the statute, at the time of the commencement of her suit.

But the question remains, whether the pleadings raise the issue of her residence. Her want of residence under the statute is clearly a personal disability, not affecting the present right of action, but only the present right to prosecute the action; a disability which might be cured; clearly matter of abatement, not of bar. "Whenever the subject matter of the defense is that the plaintiff cannot maintain any action, at any time, whether present or future, in respect of the supposed cause of action, it may and usually must be pleaded in bar; but matter which merely defeats the present proceedings, and does not show that the plaintiff is forever concluded, should in general be pleaded in abatement." 1 Chitty's Pl. 446. "All declinatory and dilatory pleas in equity are properly pleas, if not in abatement, at least in the nature of pleas in abatement; and, therefore, in general, the objections founded thereon must be taken *ante litem contestatam* by plea, and are not available by way of answer, or

[1] At common law a plea in abatement was normally affirmative in form and alleged new or additional facts under the rule that it must give the plaintiff a better writ.

[2] Statement condensed and part of the opinion omitted.

at the hearing." Story's Eq. Pl., § 708. So Lord Redesdale distinguishes pleas "that the plaintiff is not entitled to sue by reason of some personal disability," and that "the plaintiff has no interest in the subject, or no right to institute a suit concerning it," from pleas in bar, and calls them pleas to the person of the plaintiff. Mitford's Pl., 220.

And the distinction is not one of form merely, but of substance. For, generally, judgment for the defendant on pleas in abatement, abates the action only; on plea in bar, bars the cause of action everywhere and forever. In the present case, judgment against the respondent for want of residence within the statute, should not operate to bar another action here, if she should have acquired a residence; or elsewhere, at any time or under any circumstances.

The code does not touch the distinction between defenses in abatement and defenses in bar, or the legal effect of judgments upon them. It does indeed modify the manner, form and time of putting in such defenses, but does not confound them or their consequences. Formerly, pleas in abatement and pleas in bar must have been separately and successively pleaded in that order; now, matter of abatement and matter of bar may be set up as separate defenses in the same answer. Freeman v. Carpenter, 17 Wis. 126. Whether they may be successively pleaded and tried; or, being pleaded together, may be separately tried, are questions not now before us.

If certain matters in abatement are apparent in the complaint, they are ground for demurrer under the code. But if matter in abatement, not apparent in the complaint, be relied on as a defense, it must be specially pleaded in the answer. Ch. 125, secs. 5, 8, R. S.

A general denial is a plea in bar, not broader at least than the general issue at common law, and cannot raise any defense by way of abatement. Martin v. Pugh, 23 Wis. 184; Sanford v. McCreedy, 28 id. 103; Ewen v. Railway Co., 38 id. 613. Judgment for the defendant upon a general denial, is a general judgment: a bar to all future actions for the same cause.

And it would be a cruel abuse that it should go upon a defense in abatement, concealed *in gremio*. The code intended no such perversion of justice. And it is well settled in this court that matter in abatement, not apparent in the complaint, must, like other special defenses, be specially pleaded in the answer

Freeman v. Carpenter, Sanford v. McCreedy, Ewen v. Railway Co., *supra;* Moir v. Dodson, 14 Wis. 279; Cord v. Hirsch, 17 id. 403; Kimball v. Noyes, id. 695; Harbeck v. Southwell, 18 id, 418; Bevier v. Dillingham, id, 529; Wilson v. Jarvis, 19 id. 599; Robbins v. Deverill, 20 id. 142; Supervisors v. Hackett, 21 id. 613; Lefebre v. Utter, 22 id. 189; Quinn v. Quinn, 27 id. 168; Noonan v. Orton, 34 id. 259; Wittman v. Watry, 37 id. 238; Smith v. Peckham, *ante,* p. 414. This point was overlooked at the bar, and therefore not passed upon by the court, in Hall v. Hall, 25 Wis. 600.

There is a strong analogy between this question and the questions of jurisdiction in the federal courts, resting on the citizenship of parties. In those courts, all objections founded on citizenship of the parties must be specially pleaded in abatement, or they are waived.[3] Conard v. Insurance Co., 1 Pet. 386; D'Wolfe v. Rabaud, id. 476; Sheppard v. Graves, 14 How. 505.

The appellant contends that the defense here is in the nature of a plea to the jurisdiction. We do not think so, but need not discuss the point. For by all the authorities the rule equally applies to pleas to the jurisdiction, which, if not strictly pleas in abatement, are in the nature of pleas in abatement. See Chitty, Story, Mitford, *ubi supra.*

The defense, therefore, that the respondent was not a resident of the state, though well founded in fact, was inadmissible under the pleadings in this case.

Judgment reversed.[4]

DAVIS v. CHOUTEAU.

Supreme Court of Minnesota, 1884. 32 Minn. 548.

Appeal by defendants from an order refusing a new trial.

MITCHELL, J. This is an action to recover for professional services as attorney, rendered by plaintiff to defendants between

[3] But see Roberts v. Lewis, 144 U. S. 653, post, p. 511.

[4] Because of the interest of the State in actions for divorce, the judgment in this case was reversed and the cause remanded in order that the defendant might amend his answer so as to present the defense of the plaintiff's lack of legal residence in the State.

February, 1881, and August, 1883, in a suit pending in the supreme court of the United States, on appeal from the United States circuit court for the district of Minnesota. The point raised is that the evidence shows that the contract of retainer, under which the services were rendered, was made with plaintiff while he was a member of the law firm of Davis, O'Brien & Wilson, and hence was, in law, a retainer of the firm, and therefore the cause of action proved was one in favor of that firm, and not in favor of plaintiff individually, as alleged. * * * But, for the purpose of this appeal, we shall assume that the appellant is correct in the position that the other members of the firm of Davis, O'Brien & Wilson should have joined as plaintiffs. The question remains, how should this omission be taken advantage of?

Under the common-law system, in actions *ex delicto,* if a party who ought to join as plaintiff was omitted, the objection could only be taken by plea in abatement, and not as a ground of nonsuit on the plea of the general issue. In actions *ex contractu,* in case of defendants, if there was a non-joinder of a party jointly liable on the contract, the same rule obtained. But in case of plaintiffs, the non-joinder of a co-contractor might be taken advantage of at the trial, under the general issue, as a variance between the contract pleaded and that proved. The good sense of this distinction, while admitted to exist, was often questioned; and it was sometimes suggested by the courts that it would have been more convenient that the parties should, after issue joined, proceed on the merits, than that the defendant should be allowed to nonsuit the plaintiff on the trial. See Wilson v. Wallace, 8 Serg. & R. 52; 1 Chit. Pl. 14, note *x.* The change made by the Code is, we think, in accordance with this suggestion. Under its provisions we can see no ground for any distinction in this regard between actions *ex contractu* and actions *ex delicto,* or between a defect of parties plaintiff and of parties defendant. We can find no suggestion of any such distinction in any of the practice reports. On the contrary, we think the manifest intention was to require all objections to defects of parties, either plaintiff or defendant, whether in actions *ex delicto* or *ex contractu,* to be raised by demurrer, if they appear on the face of the complaint, (Gen. St. 1878, c. 66 § 92), otherwise by answer, (Id. § 94); and if not taken either by demurrer or answer, the defendant is deemed to have waived the objec-

tion. Id. c. 66 § 95. The plain purpose of these provisions is, in all cases of a defect of parties, to require the defendant to specifically raise the objection and point out the alleged defect, so that, if necessary, the court may allow an amendment supplying the defect, (as it may do, Gen. St. 1878, c. 66, § 124) and allow the action to proceed, instead of, as formerly, permitting the defendant to join issue on the merits and then move for a nonsuit on the trial.

We are of opinion that in the present case there was, at most, what, under the Code, must be deemed a defect of parties plaintiff, which, not appearing on the face of the complaint, could only be taken advantage of by answer setting it up as a defense, and, if not, would be waived, and could not afterwards be taken advantage of. See Scranton v. Farmers' & Mechanics' Bank, 33 Barb. 527; Conklin v. Barton, 43 Barb. 435; Abbe v. Clark, 31 Barb. 238; Zabriskie v. Smith, 13 N. Y. 322; Merritt v. Walsh, 32 N. Y. 685. We have carefully examined all the authorities cited by appellant, and find, so far as they bear on this question, that they were either under the former system, or else the objection was properly raised by answer. See Slutts v. Chafee, 48 Wis. 617. It is contended, however, that the objection is sufficiently made by answer in this case. When carefully analyzed, and compared with the allegations of the complaint, it will be found that this answer amounts, practically, to nothing but a denial of the complaint, and was never intended and cannot be construed to set up the defense of a defect of parties. Such a defense must be set up distinctly, and must specifically show wherein the defect consists, and who should have been joined as a party.[5]

Order affirmed.

[5] And so in the case of a non-joinder of a necessary defendant, Albro v. Lawson, 17 B. Monroe, 642, (Ky. 1856); Maurer v. Miday, 25 Neb. 575, (1889); Newhall House Co. v. Ry., 47 Wis. 516, (1879); Cone v. Cone, 61 S. C. 512, (1900); Levi v. Haverstick, 51 Ind. 236, (1875). In the Cone case the court observed:

"It (the plea in abatement) is defective, in that, to use the phraseology of the former system of pleading, it 'does not give the plaintiff a better writ.' * * * A plea in abatement for nonjoinder should give the names of the parties omitted, and show that they are alive and within the jurisdiction of the Court."

For the rule in case of a demurrer for defect of parties, see Porter v. Fletcher, 25 Minn. 493, (1879), ante p. 183.

ROBERTS v. LEWIS.

Supreme Court of United States, 1892. 144 U. S. 653.

MR. JUSTICE GRAY: * * * But a preliminary question to be decided is whether the Circuit Court of the United States appears upon this record to have had any jurisdiction of the case.

The petition or declaration alleges in due form that the plaintiff is a citizen of the State of Wisconsin, and the defendant is a citizen of the State of Nebraska; and further alleges that the plaintiff has a legal estate in and is entitled to the immediate possession of certain lots in Lancaster County in the State of Nebraska, and the defendant has kept and still keeps the plaintiff out of possession thereof; wherefore the plaintiff prays for judgment for delivery of possession of the premises to him. The answer sets up two defenses: 1st. Open and adverse possession of the premises by the defendant for ten years; 2d. A general denial of each and every allegation in the petition. The special verdict finds facts bearing on the merits of the case, but nothing as to the citizenship of the parties.

Whenever the jurisdiction of the Circuit Court of the United States depends upon the citizenship of the parties, it has been held from the beginning that the requisite citizenship should be alleged by the plaintiff, and must appear of record; and that when it does not so appear this court, on writ of error, must reverse the judgment, for want of jurisdiction in the Circuit Court. Brown v. Keene, 8 Pet. 112; Continental Ins. Co. v. Rhoads, 119 U. S. 237.

Doubtless, so long as the rules of pleading in the courts of the United States remained as at common law, the requisite citizenship of the parties, if duly alleged or apparent in the declaration, could not be denied by the defendant except by plea in abatement, and was admitted by pleading to the merits of the action. Sheppard v. Graves, 14 How. 505.

But since 1872, when Congress assimilated the rules of pleading, practice and forms and modes of procedure in actions at law in the courts of the United States to those prevailing in the courts of the several States, all defenses are open to a defendant in the Circuit Court of the United States, under any form of plea, answer or demurrer, which would have been open

to him under like pleading in the courts of the State within which the Circuit Court is held. Act of June 1, 1872, c. 225 § 5; 17 Stat. 197; Rev. Stat. § 914; Chemung Canal Bank v. Lowery, 93 U. S. 72; Glenn v. Sumner, 132 U. S. 152; Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24, 39, 40.

By the Nebraska Code of Civil Procedure, § 62, every civil action is commenced by petition; and by § 92, the petition must contain "the name of the court and county in which the action is brought, and the names of the parties, plaintiff and defendant," "a statement of the facts constituting the cause of action," and "a demand of the relief to which the party supposes himself entitled." By § 94 the defendant may demur to the petition for certain matters appearing on its face, among which are "that the court has no jurisdiction of the person of the defendant, or the subject of the action," and "that the petition does not state facts sufficient to constitute a cause of action;" and by § 95, the demurrer must specify the grounds of objection, or else be regarded as limited to the latter ground only. By § 96, "when any of the defects enumerated in § 94 do not appear upon the face of the petition, the objection may be taken by answer;" and in every case, by § 99, the answer must contain "a general or specific denial of each material allegation of the petition controverted by the defendant," and "a statement of any new matter constituting a defense."

Under this code, as under the code of New York, upon which it was modelled, the answer takes the place of all pleas at common law, whether general or special, in abatement or to the merits; and a positive denial in the answer of "each and every allegation in the petition," puts in issue every material allegation therein, as fully as if it had been specifically and separately denied. Sweet v. Tuttle, 14 N. Y. 465; Gardner v. Clark, 21 N. Y. 399; Donovan v. Fowler, 17 Neb. 247; Hassett v. Curtis, 20 Nebraska 162; Maxwell's Practice (4th ed.) 127, 128; Bliss on Code Pleading (2d ed.) § 345. And by the express terms of §§ 94, 96, above cited, an objection that the court has no jurisdiction, either of the person of the defendant or of the subject of the action, may be taken by demurrer, if it appears on the face of the petition, and by answer, if it does not so appear.

The necessary consequence is that the allegation of the citi-

zenship of the parties, being a material[6] allegation properly made in the petition, was put in issue by the answer, and, like

[6] Mr. Justice Day in Gilbert v. David, 235 U. S. 561, (1915): * * * The act of March 3, 1875, c. 137, 18 Stat. 470, 472, § 5, now § 37 of the Judicial Code, provides: "If in any suit commenced in a district court, or removed from a state court to a district court of the United States, if it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

This section defines the duty of the District Court of the United States when it shall appear to its satisfaction that the suit does not really and substantially involve a dispute or controversy properly within the court's jurisdiction. While this section gives the court the right to dismiss a suit when that situation appears, whether the parties raise the question or not, it is the duty of the defendant to bring the matter to the attention of the court, in some proper way, where the facts are known upon which a want of jurisdiction appears. Deputron v. Young, 134 U. S. 241, 251. Under the former practice, before the passage of the act of 1875, above quoted, it was necessary to raise the issue of citizenship by a plea in abatement, when the pleadings properly averred the citizenship of the parties. Farmington v. Pillsbury, 114 U. S. 138, 143; Little v. Giles, 118 U. S. 596, 604. The objection may be made now by answer before answering to the merits, or it may be made by motion. Steigleder v. McQuestion, 198 U. S. 141. The statute does not prescribe any particular mode by which the question of jurisdiction is to be brought to the attention of the court, and the method of raising the question may be left to the sound discretion of the trial judge. Wetmore v. Rymer, 169 U. S. 115, 121. It may be raised by a general denial in the answer, where the state practice permits of that course. Roberts v. Lewis, 144 U. S. 653. In the State of Connecticut, under the form of denial contained in this answer, the answer raised the issue. Sayles v. FitzGerald, 72 Connecticut, 391, 396. Moreover, the parties to the suit regarded the matter as at issue under the pleadings, and it was so held by the court. The motion of the plaintiff to strike out the motion to dismiss for want of jurisdiction was based upon the ground that that issue was already made in the pleadings. The question was properly before the court.

It is also insisted that the court erred in itself considering the testimony and in not submitting the issue to the jury. But while the court might have submitted the

other affirmative and material allegations made by the plaintiff and denied by the defendant, must be proved by the plaintiff. The record showing no proof or finding upon this essential point, on which the jurisdiction of the Circuit Court depended, the judgment must be reversed, with costs, for want of jurisdiction in the Circuit Court, and the case remanded to that court, which may, in its discretion, either dismiss the action for want of jurisdiction, or set asde the verdict and permit the plaintiff to offer evidence of the citizenship of the parties. Continental Ins. Co. v. Rhoads, 119 U. S. 237.

Judgment reversed, and case remanded to the Circuit Court for further proceedings in accordance with the opinion of this court.

BROWN v. CURTIS.

Supreme Court of California, 1900. 128 Cal. 193.

CHIPMAN, C.[7]—Action for the value of certain nursery trees sold and delivered to (?) plaintiff's assignors. Defendants answered by general denial and also set up specially, by separate answer, certain facts alleging the failure of plaintiff's assignors to comply with the terms of the contract under which the trees were delivered. The pleadings were not verified. The trial was by a jury and plaintiff had the verdict. Defendants appeal from the judgment and from the order denying their motion for a new trial.

It is claimed by appellant that there was no evidence introduced to prove an assignment or transfer to plaintiff of the claims sued on.

The complaint sets forth certain claims in two counts, one of which alleges the sale to defendants of certain fruit trees by one H. H. Linville and an assignment to plaintiff of the claim,

question to the jury, it was not bound to do so, the parties having adduced their testimony, pro and con, it was the privilege of the court, if it saw fit, to dispose of the issue upon the testimony which was fully heard upon that subject. Wetmore v. Rymer, 169 U. S. 115, supra." * * *

[7] Part of the opinion reviewing the evidence omitted.

and the other count alleges a sale by one W. J. Linville to defendants and an assignment to plaintiff. The assignment in each instance and the denial thereof raised a material issue which it was incumbent on plaintiff to establish by proof. (Read v. Buffum, 79 Cal. 77; 12 Am. St. Rep. 131; Ford v. Bushard, 116 Cal. 273.) Respondent contends that "the assignment is not the cause of action, but only the right of plaintiff to sue," and, quoting from California Steam Nav. Co. v. Wright, 8 Cal. 585, claims that "the want of legal capacity to sue is a personal disability, and, if the defendant intends to set up such a defense, he should state so distinctly. The general denial relates to some other facts alleged concerning the contract. The general issue is not sufficient." (Citing, also, White v. Moses, 11 Cal. 70; Bank of Shasta v. Boyd, 99 Cal. 604, and some other cases.)

Respondent fails to distinguish between the question of capacity and the question of right to sue. The capacity is one thing, while the right is quite another. The capacity may be admitted, but the right must rest upon proof of assignment and must be established whatever may be the capacity in which the assignee sues. * * * It was incumbent on Brown to establish his right to sue, and this necessitated proof of the assignment by which alone he had any such right. It was as necessary for Brown to prove this fact as it was to prove the indebtedness. The fundamental error of respondent was in assuming what he now urges in his brief—that "the question of assignment only goes to the capacity to sue and not to the cause of action, and therefore if defendants wish to raise the question of assignment they must do so by a special defense, and cannot do so by a general denial."

The view we have taken makes it unnecessary to notice appellants' contention that the evidence was insufficient to justify the verdict; the evidence may not be the same at the second trial.

It is advised that the judgment and order be reversed and the cause remanded.

Judgment reversed.

BAXTER by Curator v. ST. LOUIS TRANSIT CO.

Supreme Court of Missouri, 1906. 198 Mo. 1.

VALLIANT, J.—Plaintiff, a minor, received personal injuries in a collision with a street car which was being operated by defendant and sues to recover damages for the injuries, alleging that the collision was the result of the negligent operating of defendant's street car. He recovered a judgment for $4,750, and defendant appealed.

Before entering into a consideration of the merits of the case there is a question at the threshold that demands our attention.

The petition alleges that the plaintiff is a minor and that the St. Louis Trust Company, by whom as his curator he sues, is his legally appointed and duly qualified curator, that the defendant is a corporation operating a street railroad, then it proceeds to state the cause of action. The answer of the defendant was a general denial and a plea of contributory negligence. At the trial there was no proof of the appointment of the alleged curator. It is contended by defendant that the failure of proof on that point is fatal to the plaintiff's right of recovery.

At common law the character in which the plaintiff sued was not put in issue unless specifically denied. [1 Chitty on Pl. (16 Am. Ed.) p. 467.] In such case a special denial was in the nature of a plea in abatement. [Stephens on Pl. (1894) p. 467.] Such a plea, if sustained, did not bar the cause of action, but abated that suit. The character in which the plaintiff assumes to sue is entirely distinct from the cause of action alleged; for example, a plaintiff assuming to be the administrator sues to recover a debt due the estate, he may not be the administrator and therefore not entitled to maintain the suit, yet a judgment that the plaintiff in that suit is not the administrator would be no bar to an action to recover the same debt when the true administrator should sue. And that is as true under our Code of Procedure as it was at common law. In so far as the science of pleading rests on sound reason for its rules there is no difference between our system and the system of common law pleading, the conclusions of reason and common sense are the same, but in each system there are arbitrary rules and the difference between the two systems appears in those rules. For ex-

ample, it is neither illogical nor unreasonable, nor a violation of any scientific principle, to allow a defendant to plead in abatement of the suit and in bar of the action at the same time. There is nothing inconsistent or contradictory in those pleas with each other, both may be true or one may be true and the other not, and there is no difficulty in shaping the judgment to suit the facts as they may be found on the trial. Yet the common law rule is that the two pleas cannot stand together, but under the Code system the defendant not only may but is required to plead them both in one answer if he intends to avail himself of both. The rule on this point is thus stated in Bliss on Code Pleading (3 Ed.), sec. 345: "In common law pleading we have the rule that 'pleas must be pleaded in due order;' that is, the dilatory pleas must be first made and disposed of, to be followed by pleas in bar. The Code requires the defendant either to demur or answer, and in his answer he is allowed to set up as many defenses as he may have. Only one answer is contemplated, and all the defenses which he elects to make must be embraced within it." Matters in abatement and matters in bar are as essentially different under the one system as under the other, and the effect of matters in abatement is the same under both systems, that is, if the plea is sustained it abates that suit without affecting the cause of action, the only difference is that at common law it is called a plea in abatement and must be disposed of before defendant pleads to the merits of the action, while under the Code it goes under the general name of defense and may be pleaded in the same answer with a plea to the merits. The author just quoted, discussing the effect of an insufficient statement in the petition of the character in which the plaintiff sues, and holding that such defect is not reached by a general demurrer, says: "It is but reasonable, then, that the statute should require the defendant, if he objects to the plaintiff's demand because he does not show a right to appear in court, to base his objections specifically upon that ground; and I know of no comprehensive phrase that so well describes the ground of objection as a want of legal capacity to sue." [Bliss on Code Pl. (3 Ed.) p. 620, sec. 408.] In other words, if the capacity in which the plaintiff assumes to sue is defectively stated, the defect cannot be reached by a general demurrer, which goes to the cause of action, but it requires a special demurrer.

Pomeroy, a strong friend of the code system, after first pointing out the distinction between a plea in abatement and a plea in bar in respect of the order in which they were required to be pleaded, says: "There are in the new procedure no such divisions and classes. Defenses still exist of the same essential nature as those which were formerly set up by means of a plea in abatement, and a judgment thereon in favor of the defendant does not forever bar the plaintiff from the further prosecution of his demand." [Pomeroy Code Rem. (4 Ed.) pp. 799-800.] The learned law-writer, although he regards the Code as in itself a complete system depending for nothing upon the common law (Id. p. 541, Sec. 409), yet in the words just quoted he recognizes fully, as it is recognized at common law, the essential difference between matters that may be pleaded to abate the suit, and matters pleaded to defeat the cause of action, the only difference between the Code and the common law in respect to them being the manner and the order in which they are pleaded and the issues tried. And on pages 813-14, he says: "The non-joinder of necessary parties cannot be proved under the general denial. * * * The defense that the plaintiff is not the real party in interest is new matter * * * and in an action by an executor or administrator, the general denial does not put in issue the plaintiff's title to sue."

As we have already above shown, when a plaintiff sued at common law in a representative capacity, as executor or such like, and defendant, without any denial of the plaintiff's alleged character, filed his plea to the merits of the action and went to trial, he was presumed to have admitted the character assumed by the plaintiff.

There was no injustice to the defendant in that rule of pleading for if he really intended to question the matter he could by a special plea require the plaintiff to produce the proof. It is the boast of the advocates of the Code system that it is designed to reach more quickly the merits of a controversy by cutting away from the unnecessary forms and technicalities of the common law, but if our system puts the plaintiff to such proof when it is not specially called for by the defendant's answer we are more formal and technical than were our common law predecessors. * * *

The foregoing are all the decisions on this question in this

State, so far as our research has brought them to our notice.[8]

Our conclusion is that under sections 598, 599 and 602, Revised Statutes, 1899, when a plaintiff assumes to sue in a representative capacity, that capacity can be put in issue in two ways only: first, if in the body of the petition facts sufficient to constitute the capacity are not stated, the issue may be raised by a special demurrer; second, if the facts to constitute the capacity are sufficiently stated, they may be put in issue by a specific denial, but the issue is not raised in either case by a general demurrer[9] or a general denial.

It being averred in the petition in this case that the St. Louis Trust Company was the lawfully appointed and duly qualified curator of the plaintiff and there being no specific denial of that fact, it must be taken as admitted. The court did not err therefore in refusing the instructions asked by defendant in the nature of a demurrer to the evidence because of failure of proof on that point.[10] * * *

Judgment affirmed.

II. *In Discharge or Excuse.*

McKYRING v. BULL.

Court of Appeals of New York, 1857. 16 N. Y. 297.

The complaint alleges that the plaintiff entered into the em-

8 The omitted part of the opinion reviewed the following cases: Gilmore v. Morris, 13 Mo. App. 114; State v. Price, 21 Mo. 434; Cadmus v. Bridge Co., 15 Mo. App. 86; Randolph v. Ry., 18 Mo. App. 613; Clowers v. Ry., 21 Mo. App. 213; Jones v. Steele, 36 Mo. 324; Porter v. Ry., 60 Mo. 160; Sherman v. Ry., 72 Mo. 62; Rogers v. March, 73 Mo. 64; Holton v. Towner, 81 Mo. 360; Taylor v. Pullen, 152 Mo. 434.

9 But see Hamilton v. McIndoo, ante p. 459.

10 Apparently the Supreme Court of Missouri treats the case of an action by an administrator on a cause of action formerly belonging to the intestate as standing on the same basis as an action by an infant suing by guardian, curator or next friend, Gross v. Watts, 206 Mo. 373. As a general rule the administrator takes title to the choses in action of the intestate, while the guardian does not take title to the choses in action of the ward. Ed.

ploy of the defendant on the 12th day of May, 1852, and continued in such employment, doing labor and service for the said defendant, at his request, until the 3rd day of May, 1854, and avers that such work, labor and services were worth the sum of $650. It concludes as follows: "That there is now due to this plaintiff, over and above all payments and offsets, on account of said work, the sum of one hundred and thirty-four dollars, which said sum defendant refuses to pay; wherefore plaintiff demands judgment in this action for the said last mentioned sum, and interest from the fourth day of May, 1854, besides costs."

The answer consists simply of a general denial of all the allegations of the complaint.

Upon the trial before Mr. Justice Clinton, the defendant first offered evidence of payment as a defense to the action, which was objected to and excluded on the ground that it should have been pleaded. He then offered to prove partial payment, in mitigation of damages, and this also was excluded for the same reason. The jury found a verdict for the plaintiff for $135.75, for which judgment was entered, and the defendant having made a bill of exceptions, the judgment was, on appeal, affirmed by the Superior Court at general term. The defendant appealed to this court.

SELDEN, J.—Although the Code of Procedure has abrogated the common law system of pleading, with all its technical rules, yet, in one respect, the new system which it has introduced bears a close analogy to that for which it has been substituted. The general denial allowed by the Code corresponds very nearly with the general issue in actions of assumpsit and of debt on simple contract, at common law. The decisions upon the subject, therefore, in the English courts, although not obligatory as precedents since the changes introduced by the Code, will nevertheless be found to throw much light upon the question presented here.

While the general issue, both in assumpsit and debt, was, in theory, what the general denial allowed by the Code is in fact, viz., a simple traverse of the material allegations of the declaration or complaint, yet, from the different phraseology adopted in the two forms of action, a very different result was produced. The declaration, in debt, averred an existing indebtedness, and

this amount was traversed by the plea of *nil debet*,[1] in the present tense; hence, nothing could be excluded which tended to prove that there was no subsisting debt when the suit was commenced. In assumpsit, on the contrary, both the averment in the declaration and the traverse in the plea were in the past, instead of the present tense, and related to a time anterior to the commencement of the suit. Under *non assumpsit*, therefore, so long as the rule of pleading which excludes all proof not strictly within the issue was adhered to, no evidence could be received except such as would tend to show that the defendant never made the promise. That this was the view taken of these pleas, in the earlier cases, is clear.

In an anonymous case, before Lord Holt (1 Salk. 278) it was adjudged "that, in debt for rent, upon *nil debet* pleaded, the statute of limitations may be given in evidence, for the statute has made it no debt at the time of the plea pleaded, the words of which are in the *present* tense." Again, in Draper v. Glassop (1 Lord Ray. 153), the same judge said: "If the defendant pleads *non assumpsit*, he cannot give in evidence the statute of limitations, because the assumpsit goes to the *praeter* tense; but upon *nil debet* the statute is good evidence, because the issue is joined *per verba de presenti.*"

We find, however, that a practice afterwards grew up, and came at last to be firmly established, of allowing, under the plea of *non assumpsit*, evidence of various defenses, which admitted all the essential facts stated in the declaration but avoided their effect by matter subsequent, such as payment, accord and satisfaction, arbitrament, release, &c. The history and progress of this anomaly is easily traced. The first departure from principle was in relation to the general issue in actions of *indebitatus assumpsit*. In these actions, the promise alleged being a mere legal implication, arising upon the facts stated, a traverse of the promise was of course equivalent to a traverse of the allegations upon which it is predicated. Those allegations were regarded as, in substance, the same as in an

[1] While payment might be proved without a special plea in an action of debt, a plea of payment was not thought objectionable as amounting to the general issue because it confessed the debt and avoided it by subsequent matter, Hatton v. Morse, 3 Salk. 273 (B. R. 1702); Brown v. Cornish, 1 Ld. Ray. 217. The same explanation was repeated in Carr v. Hinchliffe, 4 B. & C. 547, (1825).

action of debt upon simple contract; and hence the courts concluded that a plea which put them in issue should have the same effect as the plea of *nil debet*. That this was the reasoning originally resorted to is plain from some of the older cases on the subject. In Beckford v. Clarke (1 Sid. 236), which was an action of *assumpsit* brought upon a special promise to secure goods from perils, those of the sea excepted, the Court of King's Bench held that in *assumpsit* in fact, upon *non assumpsit* pleaded, a release could not be given in evidence as a defense, but on *assumpsit* in law it might. So in the case of Fits v. Freestone (1 Mod. 210) it was held that, "In an action grounded upon a promise *in law*, payment before the action brought is allowed to be given in evidence upon *non assumpsit;* but when the action is grounded upon a special promise, then payment or any other legal discharge must be pleaded."

But, notwithstanding the distinction adverted to in these cases, the admission of the evidence, even in actions of *indebitatus assumpsit*, was a plain departure from the issue upon *non assumpsit*, which was, in terms, that the defendant had not promised; a departure, however, supposed to be justified as a sacrifice of form to substance. But the courts having already sacrificed substance to form, by allowing an action of debt to be converted into *assumpsit* by the addition of a mere fictitious promise, had imposed upon themselves the necessity of adhering to this form. By disregarding it, a manifest incongruity in pleading was produced. Tested by the language of the record, there was no difference in the issue formed by the plea of *non assumpsit*, whether the promise was express or implied. The courts, therefore, lost sight, after a time, of the distinction upon which special defenses were originally admitted in actions of *indebitatus assumpsit* alone, and, looking only at the record, took another stride, and admitted evidence of payment, release, arbitrament, &c. under *non assumpsit*, without regard to the nature of the promise.

To justify this a new theory was necessary and we find it broached by an early writer. (Gilb. C. P. 63.) It was, that the gist of the action of assumpsit was the fraud or deceit practiced by the defendant in not performing his promise; and that this was put in issue by the plea of *non assumpsit*. Hence, any evidence showing that there was no existing obligation at the commencement of the suit, and, consequently, no fraud which was

injurious to the plaintiff, would support the plea. The same reasoning is also adopted by a later writer upon pleading. (Lawes on Pl., 520, 521.) It is, however, manifestly false and illogical. Fraud or deceit never constituted the gist of the action. On the contrary, it has ever been held that fraud need not be alleged, and, if alleged, need not be proved. All the other theories, invented to account for the anomaly, were equally fallacious.

These errors proved, in their consequences, subversive of some of the main objects of pleading. They led to surprises upon the trial, or to an unnecessary extent of preparation. The courts, however, found it impossible to retrace their steps, or to remedy this and other defects in the system of pleading, without authority from parliament. This authority was at length conferred by the act of 3d and 4th William IV., ch. 42, § 1, and the judges in Hilary term, thereafter, adopted a series of rules, one of which was to correct the errors which have been adverted to. (2 Cromp. & Mees. 10.) The first rule adopted, under the head of assumpsit, provided in substance that the plea of *non assumpsit* should operate where the promise was express, as a denial of the promise, and, where it was implied, of the matters of fact upon which the promise was founded.

The object of this rule was to restore pleading in assumpsit to its original logical simplicity. It was obviously intended as a mere correction of previous judicial errors. It interprets the plea of *non assumpsit* strictly according to its terms, and thus plainly indicates that the courts had erred in departing from those terms. That this was the view of the judges, is shown by the different course taken in regard to the plea of *nil debet.* As this plea, construed according to its terms, included every possible defense within the issue which it formed, the judges did not attempt to change the import of those terms, but abrogated the plea. Rule two, under the head of "Covenant and Debt," provides that "The plea of *nil debet* shall not be allowed in any action;" and rule three substitutes the plea of *nunquam indebitatus* in its place. Thus the whole practice which had continued for centuries, of receiving evidence of payment, and other special defenses under the plea of *nil debet* and *non assumpsit,* was swept away.

There are several inferences to be drawn from this brief review, which have a direct bearing upon our new and unformed

system of pleading in this state. The first is, that no argument in favor of allowing payment, or any other matter in confession and avoidance, to be given in evidence under a general denial, can be deduced from the former practice in that respect, as this practice has been abandoned in England, not only as productive of serious inconvenience, but as a violation of all sound rules of interpretation.

A second inference is that, in regard to pleading, it is indispensable to adhere to strict logical precision in the interpretation of language. The anomaly which has been referred to was wholly produced by the slight deviation from such precision in the action of *indebitatus assumpsit* which has been pointed out.

But the most important inference to be deduced from the historical sketch just given consists in an admonition to adhere rigidly to that rule of pleading which permits a traverse of facts only, and not of legal conclusions; and this brings us to the pivot upon which the point under consideration must necessarily turn. The counsel for the defendant insists that, as the answer controverts every allegation of the complaint, it puts in issue the allegation with which it concludes, viz., that there was due to the plaintiff at the commencement of the suit, over and above all payments, &c., the sum of $134. But this allegation is a mere legal conclusion from the facts previously stated. Its nature is not changed by the addition of the words "over and *above* all payments." No new fact is thereby alleged. The plaintiff voluntarily limits his demand to a sum less than that to which, under the facts averred, he would be entitled.

Were courts to allow allegations of this sort to be traversed, they would fall into the same difficulty which existed in regard to the plea of *nil debet*, and which led the judges in England to abolish that plea. It would be impossible, under such a rule, in a great variety of cases, to exclude any defense, whatever, if offered under an answer containing a general denial. In England, as we have seen, after centuries of experience, it has been found most conducive to justice to require the parties virtually to apprise each other of the precise grounds upon which they intend to rely; and the system of pleading prescribed by the Code appears to have been conceived in the same spirit. It was evidently designed to require of parties, in all cases, a plain and distinct statement of the facts which they intend to prove; and any rule which would enable defendants, in a large

class of cases to evade this requirement, would be inconsistent with this design.

The case of Van Gieson v. Van Gieson (12 Barb. S. C. R. 520),[2] subsequently affirmed in this court, contains nothing in opposition to the doctrine here advanced. That case simply decided that where the complaint contained an averment of non-payment, a plea of payment formed a complete issue. That payment having been denied in the complaint, it was unnecessary to repeat that denial in a reply. My conclusion therefore is, that neither payment nor any other defense, which confesses and avoids the cause of action, can in any case be given in evidence as a defense under an answer containing simply a general denial of the allegations of the complaint.

The next question is, whether evidence of payment either in whole or in part, is admissible in mitigation of damages. As the Code contains no express rule on the subject of mitigation, except in regard to a single class of actions, this question cannot be properly determined without a recurrence to the principles of the common law. By those principles, defendants in actions sounding in damages were permitted to give in evidence, in mitigation, not only matters having a tendency to reduce the amount of the plaintiff's claim, but in many cases facts showing that the plaintiff had in truth no claim whatever. It was not necessarily an objection to matter offered in mitigation, that if properly pleaded it would have constituted a complete defense.
* * *

My conclusion, therefore, is, that section one hundred and forty-nine should be so construed as to require the defendants, in all cases, to plead any new matter constituting either an entire or partial defense, and to prohibit them from giving such matter in evidence upon the assessment of damages when not set up in the answer. Not only payment, therefore, in whole or in part,[3] but release, accord and satisfaction, arbitra-

[2] In the case of Van Giesen v. Van Giesen, 10 N. Y. 316, (1852), it was held that since non payment was a material allegation in the complaint a plea of payment was a denial and not new matter. The same view was taken in Frisch v. Caler, 21 Cal. 71 (1862). Quaere whether at an early period at common law the plea of payment may not have been a specific traverse, and that its form led to the notion that it was an affirmative plea?

[3] But see Quinn v. Lloyd, 41 N. Y. 349, (1869), to the effect that where the action is brought for a balance, the amount is in issue under the general denial.

ment, &c., which may still, for aught I see, be made available in England in mitigation of damages, without plea, must here be pleaded. In this respect, our new system of pleadings under the Code is more symmetrical than that prescribed by the recent rules adopted by the English judges.

The judgment of the Superior Court of Buffalo should be affirmed.

BRIDGES v. PAIGE.

Supreme Court of California, 1859. 13 Cal. 640.

BALDWIN, J.—This suit was brought as on a *quantum valebant,* for professional services as attorneys. The complaint claimed, among other charges, a sum of money due for the conduct of a suit of Paige v. O'Neill. The answer denied the value of the services as charged. The defendant proposed to show by a witness—one of the plaintiffs—that they did not perform the legal services rendered by them in the case of Paige v. O'Neill with ordinary care, diligence, or reasonable skill, but that they performed said services negligently and unskillfully, and that, by reason of such unskillfulness and negligence, the case, which is now on appeal in the Supreme Court, is in great danger of being reversed. The defendant's counsel proposed to show the above facts by an examination of the witness in connection with the judgment roll in said case, the statement on appeal, and by all the papers on file in the said action; and the said defendant's counsel further proposed to show, after the said examination was concluded, touching the unskillfulness and negligence on their part in managing and conducting said cause, that their services were not reasonably worth the amount claimed in the complaint. But the Court refused to permit or allow the defendant's counsel to go into said examination, and refused to permit the defendant's counsel, either by an examination of the witness or by an examination of the judgment roll, to show that plaintiffs had been guilty of any unskillfulness or negligence whatever.

One of the reasons given for this ruling is, that this matter is not set up in the answer. It seems to be supposed that this

was new matter, which should have been affirmatively pleaded. The rule invoked, however, does not apply to this case. Anything which shows that the plaintiff has not the right of recovery at all, or to the extent he claims, on the case as he makes it, may be given in evidence upon an issue joined by an allegation in the complaint, and its denial in the answer. Where, however, something is relied on by the defendant which is not put in issue by the plaintiff, then the defendant must set it up. That is new matter—that is, the defendant seeks to introduce into the case, a defense which is not disclosed by the pleadings. This case is a good illustration; the plaintiffs aver that the defendant is indebted to them in the sum of, say fifteen hundred dollars, for services rendered; that he is indebted to this amount because this was the value of these services. The defendant denies that he is indebted at all, and denies, further, that the services were of the value charged. He proposes to show that they were not of this value.[4] He can do this by any legal proof, and he is not bound to set out his proofs in his pleading. Facts, and not the evidence of facts, are required to be pleaded. Whatever, therefore, had a legal tendency to prove that these services were worth the sum, was competent for plaintiffs, as the nature of the suit, its difficulty, the amount involved, the skill required, the skill employed, and the like. So the defense had a right to prove these same general matters, or the negation of them, as for example, that this was a plain case, requiring but little labor or skill, learning, or time; or if it required skill and attention, that these were not bestowed. The value of a lawyer's services depends upon his skill and learning, and the attention he gives to the business of the client. It is evident, therefore, that proof of his skillful conduct of his case, or of his negligent and unskillful treatment of it, is an important inquiry. It does not follow by any means, that because a trial results in a verdict for the client, that there has been no negligence in the attorney. In consequence of the negligence, the client may have been put to great trouble and expense, though, by accident or otherwise, he happened to gain the case; and though the Court below may have decided on the trial of a case that errors negligently com-

4 In such a case the plaintiff has the burden of establishing that the services were rendered with reasonable care and skill, Harrington v. Priest, 104 Wis. 362, (1899).

mitted were not fatal, yet the defendant might show, when sued for fees by the attorney, that the Judge was mistaken in thus holding. Besides a case may be negligently conducted even when it is not eventually lost by neglect. It may put the client to great trouble, expense, and delay, to get rid of blunders of his lawyer. If, for example, an attorney should, by his neglect consent to a bill of exceptions full of errors and misstatements, and raising unnecessarily many difficult and embarrassing questions of law for revision in the Appellate Court, which questions, as the case, in fact, was presented below, did not arise, no one would pretend, that though the cause was, after long delay and much loss, gained in the Supreme Court, the attorney would not be amenable to the charge of neglect; or if the attorney suffered testimony to be introduced plainly inadmissible, and the client was put to the expense and trouble of summoning many witnesses to counteract it, though he at length did so successfully, the same objection would lie; and in both these instances, the Attorneys would be held entitled to a less sum on *quantum meruit*, than if a contrary course had been pursued. What particular errors, if any, were committed on the trial of Paige v. O'Neill, or what particular acts of negligence done, were not disclosed, the Court refusing to hear any testimony on that subject. We have not the record of that case before us, and cannot look into it. It seems that the judgment of the Court below was partially affirmed in this Court on appeal, but not, we believe, before this trial below, nor does it appear whether the matters of alleged negligence proposed to be proven were considered here. Indeed, we cannot look into any record before us, not legally offered as proof, for any purpose of the application of the facts of that record to any other case as evidence in the latter case.

It may be that the record of Paige v. O'Neill showed no negligence; and the rulings of the learned Judge below, on the motion for a new trial, would seem at the first blush to establish this fact; but we cannot know, in the face of the offer to prove the contrary, that the defendant would necessarily have been unsuccessful; nor do we understand from the broad proffer of proof, that the negligence imputed was confined to errors as shown by the record.

Judgment reversed.

SCOTT v. MORSE.

Supreme Court of Iowa, 1880. 54 Iowa 732.

The petition of plaintiff alleges in substance that in the forepart of the year 1878, as a member of the firm of Montgomery & Scott, attorneys at law, the plaintiff, at the request of defendants, rendered professional services to them about the preparation of a petition for rehearing in a case entitled Crouse v. Morse, pending in the supreme court, which services were worth $300; that afterwards, on the fourteenth day of April, 1878, the firm of Montgomery & Scott was dissolved, and the said claim was assigned to plaintiff and became his property. The plaintiff demands judgment for $300 and interest. The defendants filed an answer denying all the allegations of the petition. The cause was tried to a jury and a verdict was returned for the plaintiff for $134.37. The motion for a new trial was overruled, and judgment was entered upon the verdict. The defendants appeal.

DAY, J. It is claimed by the defendants that B. F. Montgomery, a member of the firm of Montgomery & Scott, agreed that his firm should render for defendants the services in question without charge; and it is insisted that there is no contradiction of the testimony of Montgomery that he agreed on behalf of his firm that the services should be rendered without compensation. It is claimed that upon this branch of the case the verdict is opposed to the uncontradicted testimony, and therefore is not supported by the evidence. The only pleading interposed by the defendants is a general denial of all the allegations of the petition. This denial simply puts in issue[5] the fact of the rendition of the services, their value, and that the claim therefor has been assigned to the plaintiff. If the defendants intended to rely upon the fact that there was an agreement that the services in question should be rendered without compensation, such defense should have been specially pleaded. "Any defense which admits the facts of the adverse pleading, but by some

[5] Compare Bussey v. Barnett, 9 M. & W. 312, (1842), that a defence that the goods had been paid for on delivery was negative and therefore need not be specially pleaded under the Hilary Rules.

And, so in Starrett v. Mullen, 148 Mass. 570, (1889).

other matter seeks to avoid their legal effect, must be specially pleaded." Code § 2718.

The case falls fully within the principle of Parker v. Hendrie, 3 Iowa 263. In that case, as in this, evidence was introduced and instructions were given on an issue not tendered by the pleadings. A verdict was returned for the plaintiff, which the defendant moved to set aside on the ground that it was against the law and evidence. The motion was overruled. On the question presented the following language is employed: "The testimony as to the agreement to return the machine, and the instructions based thereon, relate to an issue not made, or attempted to be made, by the pleadings. The testimony was, therefore, immaterial. To justify the granting of a new trial, on the ground that the verdict is against the weight of the evidence, such want of evidence must relate to a material issue, legitimately made by the pleadings. It is the issues of fact made by the pleadings which the jury are to determine, and not others or different ones." This case we regard as decisive of the question now involved.

Affirmed.

CORBY, EX'RX v. WEDDLE.

Supreme Court of Missouri, 1874. 57 Mo. 452.

This was an action on a promissory note, alleged to have been executed by the defendant to one Glasgow, and by him endorsed for value and before maturity to the plaintiff's intestate. The answer denies the execution of the note and was duly verified by affidavit.[6]

At the trial the defendant's evidence, which was admitted over objection, tended to show that he could read writing to a very limited extent, and that the note was represented to him as a mere agency contract, and that he signed it without knowledge of its true character. The court instructed the jury that if the defendant was induced by such false pretense to sign the

6 This answer was based on the provision of the Missouri Code, requiring a specific denial, verified by affidavit, to put in issue the execution of an instrument sued on. See Mo. R. S. 1919, § 1415.

note, the plaintiff could not recover. There was a verdict and judgment for defendant, and the plaintiff sued out a writ of error.[7]

VORIES, J. * * * It is also contended by the plaintiff, that the defense of the defendant, as shown by the evidence, was improperly admitted under the pleadings; that the answer only denied the execution of the note, and that evidence to show that his name had been procured to the note, without his consent, by fraudulent practices, could not properly be admitted under such an answer; that in order to admit such evidence, the defendant should have admitted the execution of the note and set up the fraud in avoidance of a recovery thereon. This position I think is untenable. The general rule is, that when a deed is void *ab initio,* and not merely voidable, the plea of *non est factum* is proper; and the facts showing the instrument to be void, may be given in evidence to sustain such plea.[8] (Bottomley v. The United States, 1 Story 135; 3 Phillips on Evidence, top page 389.) * * *

Judgment affirmed.

SCHWARZ v. OPPOLD.

Court of Appeals of New York, 1878. 74 N. Y. 307.

RAPALLO, J.:[9] * * * The only points before us are those which arise on the exceptions taken at the trial.

The exception mainly relied upon was to the admission of the evidence of the defendant Wilhelm Oppold to the effect that the words "with interest" which appear at the end of the note

7 Statement condensed and part of the opinion omitted.

8 See George v. Tate, 102 U. S. 564; Dorr v. Mounsell, 13 Johnson, 430, post 576; Whipple v. Brown, 225 N. Y. 237, (1919), in which it is said:

"There is a material and manifest distinction between a meeting of the minds of parties through deceit on the part of one of them, and a writing excusably and justifiably executed by the one which, through the deceit of the other, does not express the agreement of the parties. This distinction has been expressed thus: 'Fraud in the factum renders the writing void at law, whereas fraud in the treaty renders it voidable merely.'"

9 Statement and part of the opinion omitted.

given in evidence were not there when he signed it. The objection taken was was that no such defense was pleaded.

The complaint set forth a note payable on demand with interest. The answer of the maker, Wilhelm Oppold, contained a general denial. The note put in evidence purported to be payable with interest as alleged in the complaint. It was clearly competent for the defendant under his general denial to controvert this proof by showing that the note had been altered since its execution by adding the words "with interest." This alteration, which was established by the finding of the jury, clearly destroyed the effect of the note as evidence, and precluded any recovery thereon in the absence of sufficient explanation of the alteration. * * *

Judgment affirmed.

BUTTERMERE v. HAYES.

Court of Exchequer, 1839. 5 M. & W. 456.

PARKE, B. The question which the court reserved for consideration was, whether, in an action on an executory contract concerning an interest in land, the plaintiff was required, on a plea of *non assumpsit*, to prove a memorandum in writing as required by the 4th section of the Statute of Frauds. Upon this point, depending upon the construction of the New Rules, a considerable difference of opinion has prevailed in the profession and the Court have therefore been desirous to give the question full consideration.

There is no doubt that before the new rules of pleading, such proof would have been necessary. But the 1st and 3rd of these rules, in actions of assumpsit, have limited the operation of the plea of *non assumpsit*. Allegations in the declaration are now admitted by that plea, which formerly it required the plaintiff to prove; and defenses are now excluded by the new rule, which formerly might have been proved under it. Before the New Rules, under the plea of *non assumpsit*, the plaintiff was required to prove all the material averments in the declaration, and not merely the making of the contract declared on: and the defendant was at liberty not only to disprove all the allegations

of the declaration, but to show by evidence consistent with them, that the contract, though actually broken, was void in law, and even to prove defenses, such as release, or accord and satisfaction, which showed that though a cause of action had once subsisted, it was put an end to before the commencement of the suit. The object of the New Rules was clearly to remove this inconvenience, and with that view the first and third of these in assumpsit restrict the general issue, by limiting the operation by which it formerly put in issue all the averments in the declaration in actions on special contracts, and by confining it to a denial of one of them only, namely, of the contract declared on, and by excluding all defenses which might formerly have been made by disproving all the other allegations of the declaration, or by proof of matter which showed that the contract was void, or that the cause of action had ceased before the commencement of the suit. In the present case the question in effect is, whether the writing required by the 4th section of the Statute of Frauds, and which formerly was a necessary part of the plaintiff's proof on the issue of *non assumpsit*, is so still; and the Court are of the opinion that it is. Under the former system of pleading, the plaintiff was required to prove a writing within the Statute of Frauds. This must have been in order to support some allegation of his declaration, and there is no allegation, except that of the making[10] of the contract, which it supports. This allega-

10 Compare Maule, J., in Leroux v. Brown, 12 C. B. 801 (1852). "The 4th section of the Statute of Frauds enacts that "no action shall be brought upon any agreement which is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized." Now, this is an action brought upon a contract which was not to be performed within the space of one year from the making thereof, and there is no memorandum or note thereof in writing signed by the defendant or any lawfully authorized agent. The case, therefore, plainly falls within the distinct words of the statute. It is said that the 4th section is not applicable to this case, because the contract was made in France. This particular section does not in terms say that no such contract as before stated shall be of any force; it says, no action shall be brought upon it. In their literal sense, these words means that no action shall be brought upon such an agreement in any court in which the British legislature has power to direct what shall and what shall not be done; in terms, there-

tion is still put in issue by the plea of *non assumpsit;* and there is nothing in the New Rules which alters the evidence by which the plaintiff was required to support it.

It was contended on behalf of the plaintiff, that the want of a writing to satisfy the Statute of Frauds was a matter which was required to be specially pleaded under the 3rd rule, as showing the contract to be void or voidable in point of law; but we think that the meaning of this part of the rule is to require matter to be specially pleaded which would have been the subject of proof on the part of the defendant, such as usury, fraud, &c.; and not to exempt the plaintiff from proving anything which he would formerly have been required to prove. We therefore think that the writing required by the 4th section must be proved on the general issue by the plaintiff.

This Court has already intimated its opinion, that the plaintiff must prove a note in writing, required by the 17th section, on the plea of the general issue; Johnson v. Dodgson (2 M. & W. 657); Elliott v. Thomas (3 M. & W. 170); and we have no difficulty in saying that in the other cases in which the Statute

fore, it applies to something which is to take place where the law of England prevails. But we have been pressed with cases which it is said have decided that the words "no action shall be brought" in the 4th section are equivalent to the words, "no contract shall be allowed to be good," which are found in another part of the statute. Suppose it had been so held, as a general and universal proposition, still I apprehend it would not be a legitimate mode of construing the 4th section, to substitute the equivalent words for those actually used. What we have to construe, is, not the equivalent words, but the words we find there. If the substituted words import the same thing, the substitution is unnecessary and idle; and, if those words are susceptible of a different construction from those actually used, that is a reason for dealing with the latter only. It may be, that, for some purposes, the words used in the 4th and 17th sections may be equivalent; but they clearly are not so in the case now before us; for, there is nothing to prevent this contract from being enforced in a French court of law. Dealing with the words of the 4th section as we are bound to deal with all words that are plain and unambiguous, all we say, is, that they prohibit the courts of this country from enforcing a contract made under circumstances like the present,—just as we hold a contract incapable of being enforced, where it appears upon the record to have been made more than six years. It is parcel of the procedure, and not of the formality of the contract. None of the authorities which have been referred to seem to me to be at all at variance with the conclusion at which we have arrived."

of Frauds requires a writing, as, for instance, in cases of demises for three years, a writing must be proved, not merely on a special traverse of the demise, but where the denial of the demise is included in the general issue.

The rule, therefore, which has been obtained in this case, to enter a verdict for the defendant on the first count, must be made absolute.

Rule absolute.

SPRINGER v. KLEINSORGE.

Supreme Court of Missouri, 1884. 83 Mo. 152.

Philips, C. This is an action to recover from the defendant the amount alleged to have been bid by him for certain real estate sold in the name of Nicholas Springer and others at public auction. The answer tendered the general issue, and further pleaded that at said sale false and fraudulent bidders, known as bybidders, through the connivance of plaintiff's testator, were present, and that false representations were then and there made by vendors, by reason of which defendant was misled into making a bid at said pretended sale.

On a trial before the court, without a jury, the court found the issues for the defendant, and dismissed the petition. From this judgment plaintiffs appealed to the St. Louis court of appeals, where the judgment of the circuit court was reversed. From this last judgment the defendant prosecutes this appeal.

1. The statute of frauds is invoked in argument by the defendant. The court of appeals held that "the statute of frauds is not in the case at all because it is not pleaded." We cannot assent to this proposition. The petition avers a contract of sale respecting real estate. It is not averred whether the contract is in writing or not. The presumption, however, in such case is, that the contract is such as the law recognizes. If it appeared on the face of the petition that it was not in writing, duly executed, the petition would be demurrable. This fact not so appearing, the defendant, to avail himself of the statute of frauds, must raise the issue by answer. But it is not necessary that the answer should, in so many words, plead the statute *eo nomine*.

"Where the defendant in his answer denies the contract, it is not necessary for him to insist upon the statute as a bar." Wildbahn v. Robidoux, 11 Mo. 660; Hook v. Turner, 22 Mo. 333-335. It is as fully raised by a general denial "as any other answer could raise it." Wisnell v. Tefft, 5 Kan. 263; Bliss on Pl. 353; Allen v. Richard, *ante*, p. 55.

On such state of the pleadings the plaintiff, as said by Ryland, J., in Hook v. Turner, *supra*, "must produce legal evidence of the existence of the agreement, which cannot be established by parol proof." This logically results from the general denial authorized by the practice act. The general denial puts in issue every fact included within the allegations of the petition, which the plaintiff must prove in order to a recovery. Northrup v. Miss. V. Ins. Co., 47 Mo. 435-444. In the action of replevin and of ejectment, under a general denial, the defendant may show that the claim of plaintiff is fraudulent and bad, and thus avoid the plaintiff's title. Greenway v. James, 34 Mo. 328; Bobb v. Woodward, 42 Mo. 488; 25 Wis. 35-36; 3 Bibb 216. The answer in this case contains, first, a general denial of the allegation of the petition. It is true, it pleads other matters of special defense, but the new matter is in nowise inconsistent, in contemplation of the practice act, with a general denial. They can well exist together in point of fact and law. Nelson v. Brodhack, 44 Mo. 596.

This construction of the pleading in this case is in nowise in conflict with the cases of Gardner v. Armstrong, 31 Mo. 535; Rabsuhl v. Lack, 35 Mo. 316; and Graff v. Foster, 67 Mo. 512, cited by the court of appeals in support of its ruling. In the first case cited the court simply holds, that the petition was not demurrable for failing to recite that the contract was in writing. That was matter of defense to be raised by the answer. It does not say that the question would not be well raised, under our present practice act, by the general issue. So in the case in 35 Mo., the answer admitted the indebtedness without pleading the statute. And in Graff v. Foster, an examination will show that the answer did not deny the contract, but merely put in issue the indebtedness. To deny the indebtedness is no denial of the existence of the contract out of which the petition avers the indebtedness arose. Engler v. Bate, 19 Mo. 543.

Judgment (of the Court of Appeals) reversed.

MATTHEWS v. MATTHEWS.

Court of Appeals of New York, 1897. 154 N. Y. 288.

This action was brought to recover damages for the breach of an alleged contract, by which the defendant, Horace Matthews, agreed to transfer his property to the plaintiff and her husband, in consideration of their removing from Pierrepont, St. Lawrence county, to Keesville, Clinton county, and going into possession of the defendant's house, lands and personal property, and there making a home for him for life. The complaint did not show whether the alleged contract was oral or written. The answer contained a general denial, but did not set up the Statute of Frauds. The trial court awarded the plaintiff $947 and interest; the Appellate Division reduced the recovery to the sum of $70, composed of items for certain repairs made for, and produce furnished to, the defendant. Subsequently to the argument in the Appellate Division, the defendant died, and the action was continued in the name of the administratrix.

ANDREWS, C. J. Subsequently to the decision of the former appeal in this case (133 N. Y. 681, 31 N. E. 519), the case of Crane v. Powell, 139 N. Y. 379, 34 N. E. 911, came before the court, in which the controverted question was whether, in an action on an oral contract within the statute of frauds, where the complaint did not disclose the nature of the contract, whether oral or written, it was necessary for the defendant to plead the statute in order to avail himself of the objection. The question was distinctly decided in that case, and it was held that the statute was a defense, and, unless pleaded, was not available to the defendant to defeat the action. The case must be regarded as settling the law of this state upon a question upon which the courts of different jurisdictions have differed in opinion. This court regarded the rule adopted in Crane v. Powell as sound in principle, and as supported by the rule applied in analagous cases.

It is plain, upon the view that the statute of frauds does not make an oral contract within its terms illegal, but only voidable at the election of the party sought to be charged, that such election must be manifested in some affirmative way. The mere denial in the answer of the contract alleged in the complaint, when the character of the contract is not disclosed, is quite con-

sistent with an intention to put in issue simply the fact whether any agreement was entered into, either oral or written. One of the rules established by the English judicature act, as amended in 1873 (38 & 39 Vict. c. 77, order 19, rule 23), ordained that, "where a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract, and not of its legality or its sufficiency in law, whether with reference to the statute of frauds or otherwise"; and in Towle v. Topham, 37 Law T. (N. S.) 309, Jessel, M. R., applied the rule to the pleadings in an equity case. The statutory rule enacted by the English judicature act was regarded by this court in Crane v. Powell as declaring the true rule, independently of the statute. The mere denial in the answer in the present case of the contract alleged in the complaint did not, therefore, raise any question under the statute of frauds, and it could not be raised by objection on the trial to the proof of the oral contract, for the very conclusive reason that the statute must be pleaded before the validity of the contract on that ground can be assailed. Regarding the agreement alleged and found in this case as one for the sale and conveyance to the plaintiff of the house and lot, and applying the rule established in Crane v. Powell, it is plain that it must be treated as a valid contract, and its breach by the original defendant (who has died since the last trial) as giving a right of action for damages, as if the contract had been written and not oral.

The complaint alleged a contract founded on a good consideration, but did not allege whether it was oral or written. The defendant in his answer denied the making of the contract alleged, but did not plead the Statute of Frauds as a defense. On the trial the plaintiff proved an oral contract to the effect stated in the complaint. The defendant objected that the oral contract was void by the Statute of Frauds, but the objection was overruled. * * * The judgment of the Appellate Division should be reversed and the judgment of the Special Term affirmed.[1]

1 For a collection of the cases on the proper pleading to raise the defence of the statute of frauds, see Henry v. Hilliard, 49 L. R. A (N. S.) 1, annotated.

PASTENE v. PARDINI.

Supreme Court of California, 1902. 135 Cal. 431.

HENSHAW, J. This was an action upon a promissory note. The complaint contained the usual averments. It charged that Luigi Pardini, "for a valuable consideration, made, executed, and delivered to plaintiff a promissory note," etc. It also averred nonpayment of the principal sum and interest, and that the whole was due and unpaid. The answer was a denial that "Luigi Pardini, for a valuable consideration or otherwise, made, executed, and delivered to plaintiff, a promissory note for the sum of twenty-five hundred dollars or any other sum." The next denial of the answer was: "Denies that Luigi Pardini has not paid the alleged note set forth in plaintiff's complaint; denies that the said Luigi Pardini has not paid the interest on said alleged note set forth in plaintiff's complaint; denies that said alleged note or the interest is still unpaid." Following these denials was a cross complaint to the effect that the sum of $800 was loaned to plaintiff by Luigi Pardini.

At the opening of the trial, plaintiff's attorneys stated what he believed to be the issues involved, and that the sole issue was the execution of the note, stating, further, his conviction that the cross complaint was not proper in the action. The court, in passing upon the suggestion of the attorney, held that the cross complaint could not be set up in the action, and settled the pleadings by declaring: "The only issue under the pleadings is whether the deceased, Pardini, executed the note." Appellants contend that by the ruling of the court above quoted he was deprived of his defenses to the note of nondelivery, want of consideration, and payment. * * *

As to the second and third contentions, that the defendant was deprived of his defenses of lack of consideration and payment, it is sufficient to say that such defenses are affirmative defenses to be pleaded, and this, defendant did not do. He contented himself in his answer with a naked denial of the averments of the complaint, and this, as has been repeatedly held in this and in other code states, is not sufficient to raise either

of these issues. "A promissory note imports[2] a consideration, and therefore it is not necessary that a consideration should be specially alleged. If there was no consideration, the defendant should have filed an answer setting up a want of it as a defense to the action." Winters v. Rush, 34 Cal. 136. The introduction of the unpaid note by the plaintiff was sufficient evidence, if evidence was necessary, in support of his negative allegation of nonpayment (Brennan v. Brennan, 122 Cal. 441, [55 Pac. 124, 68 Am. St. Rep. 46]); but payment is an affirmative defense, which must be pleaded. (Melone v. Ruffino, 129 Ca. 514, [62 Pac. 93, 79 Am. St. Rep. 127.]) Therefore, defendant has no just cause for complaint that he was excluded by the ruling of the court from offering evidence upon defenses which he had not raised.

There was sufficient evidence to support the findings of the court upon all the issues, and, as defendant was not deprived of any defense to which he was entitled, the judgment is affirmed.

BARKER v. WHEELER.

Supreme Court of Nebraska, 1901. 62 Neb. 110.

SULLIVAN, J. Bert Glendore Wheeler sued the plaintiffs in error as sureties upon an official bond, and obtained judgment against them. The petition alleges that one James W. Eller was county judge of Douglas county during the term ending January 3, 1894; that the defendants George E. Barker and William S. Rector were the sureties upon his official bond; that Eller in his official capacity received certain money belonging to the plaintiff, and converted the same to his own use. The answer admits that Eller was county judge, and that defendants were his sureties, but denies in general terms the other averments of the petition. The only assignment of error with which we have

2 At common law a promissory note appears to have been regarded in the same light as other simple contracts, so that consideration was an essential part of the plaintiff's case to be pleaded and proved by him. Delano v. Bartlett, 6 Cush. 364, (1850), burden of proof on plaintiff; Ballou v. Wells, 12 Allen 455, (1866), plea of want of consideration not new matter.

to deal calls in question a ruling of the trial court excluding evidence tending to show that Eller, while he was yet judge of the county court, paid the plaintiff's money to her duly constituted guardian. The correctness of this ruling depends upon whether, in actions of this kind, evidence of payment is admissible under a general denial. It is settled doctrine in this state, that, in actions to recover money claimed to be due upon ordinary contracts, the general denial is the Code equivalent of the common law plea of *non-assumpsit,* and hence does not put the allegation of nonpayment in issue. Magenau v. Bell, 14 Neb. 7, (14 N. W. 664); Clark v. Mullen, 16 Neb. 481, (20 N. W. 642); Lamb v. Thompson, 31 Neb. 448, (48 N. W. 58); Lewis v. Lewis, 31 Neb. 528, (48 N. W. 267); Live-stock Co. v. May, 51 Neb. 474, (71 N. W. 67); Hudelson v. Bank, 51 Neb. 557, (71 N. W. 304). These cases recognize no distinction between payment according to the terms of the contract and payment after breach of the contract, and one of them, at least (Clark v. Mullen, 16 Neb. 481, 20 N. W. 642), is a direct adjudication to the effect that payment at the time the goods were sold and delivered, and before a cause of action arose, could not be shown unless specially pleaded. But neither this court nor any other, so far as we know, has ever held, in an action on an official bond or other bond of indemnity, that the plaintiff was, by a general denial, relieved of the necessity of proving the loss or injury out of which arose the right of action. The defendants did not by their bond become indebted to the plaintiff. They assumed no specific obligation to her which they were bound at all events to discharge, by payment or otherwise. Their promise, given to the county of Douglas, was to make good any loss that the public or individuals might sustain by reason of the official misconduct of Eller. This being so, it would be illogical—it would be inconsistent with reason and common sense—to hold that a general denial, like the plea of *non-assumpsit,* put in issue nothing but the execution of the bond. An offer to prove payment is not in every case an implied admission that the plaintiff once had an actionable demand against the defendant; its purpose may be, as in this case, to prove that a right of action never existed. Eller received the money in question rightfully. His possession of it as county judge was lawful, and there is no presumption that he was guilty of official misconduct. The allegation of conversion was, therefore, a material one, and it was not admitted

by the general denial. Payment was not new matter, within the meaning of section 99 of the Code of Civil Procedure, for it was offered, not to show the discharge of an obligation that once existed, but to show that the bond had not been forfeited, as alleged, that Eller had not been guilty of official misconduct, that the plaintiff had not been injured; in short, that one of the essential averments of the petition was not true. In State v. Peterson (Mo. Sup.), 39 S. W. 453, which was an action upon an official bond, the court, speaking by Macfarlane, J., said that "in cases in which nonpayment is a material fact necessary to constitute a cause of action, it must be alleged and proved as part of plaintiff's case, and defendant can controvert it, under a general denial, by proof that payment was made." Other cases to the same effect are Manufacturing Co. v. Tinsley, 75 Mo. 458, and Knapp v. Roche, 94 N. Y. 329. The case of Hudelson v. Bank, *supra,* does not at all support the position for which the plaintiff contends. It merely decides that, in an action by a mortgagee for possession of mortgaged chattels, an allegation of nonpayment of the mortgage debt is indispensable. The legal effect of a general denial was not determined, nor was there any occasion to consider the question, as the statute declares the effect of such a denial in actions of replevin.

The judgment heretofore rendered in this court is set aside, the judgment of the district court is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

FINLEY v. QUIRK.

Supreme Court of Minnesota, 1864. 9 Minn. 194.

WILSON, J. Action for breach of warranty of a horse. The suit was originally commenced in justice's court, and after judgment removed by appeal into the district court of Rice County. In the complaint the plaintiff "charged that the defendant in sale of a horse to him warranted the horse to be sound, perfect in every respect, and true, gentle, and willing to work—all which representations he knew to be false." Defendant in his answer "denied the warranty and all knowledge of any defects,

and alleged that at the time of sale the horse was sound, gentle, and willing to work." Verdict was rendered in the district court for the plaintiff, and the defendant thereupon moved the court for a new trial. The motion was denied, and the defendant appealed to this court.

The grounds for a new trial urged in this court are: First, error in law occurring at the trial and excepted to; second, that the evidence was not sufficient to justify the verdict. These objections we will examine in the inverse order of their statement. * * * Third, in the examination of the plaintiff's witnesses, it appeared that on Saturday the parties met, and the plaintiff agreed to purchase and the defendant to sell the horse at a price agreed upon. The plaintiff then paid $5 to "bind the bargain," agreeing to pay the balance of the purchase money on the next day, when the horse was to be delivered. The horse was delivered, and the purchase money paid, on the next day (the Sabbath), in pursuance of the contract.

When the plaintiff closed his evidence and rested his case the defendant moved the court for judgment on the ground that the evidence showed that the bargain was consummated on Sunday. The motion was denied, and defendant excepted. This is the principal point in the case; we think the only one relied upon by defendant's counsel. The sale of a horse consummated on the Sabbath is void, and an action on the warranty in such sale will not lie. Comp. Stat. 730, § 19; Smith v. Wilcox, 24 N. Y. 353; Northrup v. Foot, 14 Wend. 248; Brimhall v. Van Campen, 8 Minn. (13); Finney v. Callendar, id. (41). It is claimed by the counsel for the plaintiff that this point was not in issue, and therefore that the evidence touching it was irrelevant. It is doubtless true that evidence must correspond with the allegations, and *be confined to the point in issue,* and if in the examination of witnesses facts come out which, had they been alleged, would furnish ground of relief or defense, such facts must be disregarded unless they are warranted by the allegations of the pleadings. Stuart v. Merchants' and Farmers' Bank, 19 Johns. 505; Field v. Mayor of N. Y., 6 N. Y. 179.

The defendant insists that the answer doth not admit a *valid* contract. We will for the present take this for granted, and examine the case in that point of view. The case therefore turns on the question whether it was necessary to specifically aver in the answer the facts establishing this defense.

We think this must be answered in the affirmative, whether it is viewed as a question of principle or by the light of authority. Our statute provides, that "the complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language, etc.; that the answer must contain (1) a denial of *each allegation of the complaint controverted,* and (2) a statement of any *new matter constituting a defense,*" etc.; that "an issue of fact arises upon a *material allegation* of the complaint controverted by the answer," etc.

It will be observed that the plaintiff can only allege *facts,* and that in the answer the defendant *must* either deny *the facts alleged* in the complaint, or allege new matter by way of defense or avoidance. And when the answer consists merely of a denial, it is quite clear that the plaintiff will only be required to prove, and the defendant only permitted to controvert, the facts *alleged* in the complaint. Allen v. Patterson, 7 N. Y. 478; Mulry v. Mohawk Valley Ins. Co., 5 Gray 544. In the language of Mr. Justice Selden, in case of Benedict v. Seymour, 6 How. Pr. R. 298, "A general traverse under the code authorized the introduction of no evidence on the part of the defendant, except *such as tends directly to disprove some fact alleged in the complaint.*" If the question of the legality of the sale can be raised by a denial of any allegation of the complaint, it must be by a denial of the sale, for the day or time of the sale is not a material or traversable fact. 1 Chitty Pl. 613-14, 621; 1 Barb. Ch. Pr. 136; 2 Saund. 219; Steph. Pl. 244-45; Newman v. Otto, 4 Sandf. 688.

We have above seen that an issue of fact arises only upon a material *allegation* of the complaint controverted by the answer, and in this case the legality of the sale is not alleged, and of course is not and could not be denied or controverted. Nor is such an allegation necessary, for it is a well established rule of pleading that it is not necessary to allege what the law will presume, and everything is presumed to have been legally done until the contrary is proved. 1 Chitty Pl. 221; Maynard v. Tolcott, 11 Barb. 569; Steph. Pl. 353-54; 1 Van Sant. Pl. 330. But even if it was admitted that the defendant might by a mere denial raise an issue on a fact not specifically alleged, yet the *legality* of the sale is not a traversable fact but a conclusion or inference of law. 1 Chitty Pl. 213-14, 540; Ensign v. Sherman, 13 How. Pr. R. 35; Mann v. Morewood, 5 Sandf. 564; Lienan v. Lincoln, 2 Duer 670; Lawrence v. Wright, id. 673; Moss v.

Riddle, 5 Cranch 351; Major v. The State, 8 Blackf. 72. And a traverse or denial can only be of matter of fact and not of conclusion of law. 1 Chitty Pl. 612; Steph. Pl. 191; 1 Barb. Ch. Pr. 133; Comp. Stat. 541; Moss v. Riddle, and Major v. The State, above.

The *true object* of pleading is and always has been to apprise the adverse party of the *ground* of action or defense, in order that he may be prepared to contest it, and may not be taken by surprise. 1 Chitty Pl. 478, 213; Mann v. Morewood, 5 Sandf. 564; Story Eq. §§ 255-57, 852; 1 Barb. Ch. Pr. 137. The rules of pleading will generally be found to be ancillary to or the logical sequence of this cardinal principle or rule. Facts are only to be stated in pleadings, and not arguments, inference, or matters of law. 1 Chitty Pl. 214; Story Eq. Pl. 852; Lienan v. Lincoln, 2 Duer, 670; Lawrence v. Wright, id. 673; because the statement of *facts* is necessary to apprise the adverse party of the *ground* of action or defense. Mr. Justice Buller well says that it is "one of the first principles of pleading that there is only occasion to state facts, which must be done for the purpose of informing the court whose duty it is to declare the law arising upon those facts, and of apprising the opposite party of what is meant to be proved in order to give him an opportunity to answer or traverse it." Doug. 159; 1 Chitty Pl. 213. With the same object in view our legislature provides that every ground of action or defense should be stated "in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended."

The answer in this case gives no intimation of the *nature* of the defense relied upon, or that any defense is to be interposed except by disproof of the facts alleged in the complaint. Such a defense is not admissible under an answer merely by way of denial. It is not in principal distinguishable from any other which admits a contract in point of fact, that is alleged to be void in point of law; as, for instance, usury, gaming, stock jobbing, coverture, fraud, etc. The facts tending to establish any such defense are, in their nature, "new matter constituting a defense," or, to use an expression more common in the law, and having the same meaning, "matter in confession and avoidance." Catlin v. Gunter, 11 N. Y. 368; Tidd. Pr. 643, 685; Fay v. Grimsteed, 10 Barb. 321; Gould v. Horner, 12 Barb. 602; Watson v. Bailey, 2 Duer 509. The *principles* of pleading in

courts of law and equity, and the express provisions of our statute require that such matter should be specifically averred in the answer. See cases last above cited. Gouverneur v. Elmendorf, 5 Johns. Ch. 79; Stuart v. Merchants' & Farmers' Bank, 19 Johns. 496; Richards v. Worthley, 5 Wis. 73; Steph. Pl. 213; Mulry v. Mohawk Valley Ins. Co., 5 Gray 541; Bradford v. Tinkham, 6 Gray 494; 1 Chitty Pl. 526; id. 213. Thus *only* can the answer apprise the plaintiff of the ground of defense, which we have seen is the true object of pleading. This general rule, and the necessity for its observance, are well illustrated and impressed by the case before us. It is true that at common law, in *assumpsit* on the general issue, matters of defense of this character may be given in evidence.

But these rulings are not applicable as precedents in this case; because—*first,* the general issue cannot be pleaded under our statute; *second,* the rules of pleading under the general issue at common law have always been admitted to be at variance with the *principles* and *logic* of that system of pleading (Steph. Pl. 158; 1 Chitty Pl. 526, 473, 478-9, 213); and *third,* by the rules of Hil. T. 4 W. 4, in England *"this abuse has been corrected,"* and matters of defense of this character must now be *specially* pleaded (see said rules); *fourth,* at common law (irrespective of the rules of H. T.), where there is a contract in point of fact, as in this case, the defendant has the option either to plead the general issue, or to plead specially any matter showing it void or voidable in point of law (Tidd Pr. 643; 1 Chitty Pl. 526; id. 213-4), which is a recognition of the principle, by us held in this case, that such special matter is not by way of denial, but by way of avoidance of the matters alleged in the complaint. For that which is only a traverse or denial of the allegations of the complaint can never be *specially* pleaded at common law. Steph. Pl. 202-3; Bank of Auburn v. Weed, 19 Johns. 300; 1 Chit. Pl. 527; Tidd Pr. 653-4.

We hold, therefore—*first,* that an answer, merely by way of denial, raises an issue only on the *facts* alleged in the complaint; *second,* that the denial of the sale of the horse in this case only raised an issue on the sale in *point* of fact, and not on the question of the *legality* of such sale; *third,* that all matters in confession and avoidance, showing the contract sued upon to be either void or voidable in point of law, must be affirmatively pleaded.

We have thus far treated the case as if the answer denied each allegation of the complaint. This, we think, cannot be admitted. The only facts controverted are—*first*, the warranty; *second*, the breach of warranty. These facts, only, the plaintiff was required to prove. A sale of the horse was admitted, and whether that sale was void or valid was not a question in the case.

The decision of the court below was, therefore, correct in any point of view.

Judgment affirmed.

OSCANYAN v. THE ARMS CO.

Supreme Court of United States, 1880. 103 U. S. 261.

MR. JUSTICE FIELD delivered the opinion of the court.

This is an action to recover the sum of $136,000, alleged to be due to the plaintiff upon a contract with the defendant, as commissions on the sales of fire-arms to the Turkish government, effected through his influence. The defendant pleads the general issue. At the time the transactions occurred, out of which this action has arisen, the plaintiff was consul-general of the Ottoman government at the port of New York. The defendant is a corporation, created under the laws of Connecticut. The action was originally commenced in the Supreme Court of New York, and on motion of the defendant, was removed to the Circuit Court of the United States. When it was called for trial, and the jury was impanelled, one of the plaintiff's counsel, as preliminary to the introduction of testimony, stated to the court and jury the issues in the case, and the facts which they proposed to prove. From such statement it appeared that the sales for which commissions were claimed by the plaintiff were made whilst he was an officer of the Turkish government, and through the influence which he exerted upon its agent sent to this country to examine and report in regard to the purchase of arms. The particulars of the services rendered will be more fully mentioned hereafter. It is sufficient now to say that the defendant, considering that the facts which the plaintiff proposed to prove showed that the contract was void as being corrupt in itself and prohibited by morality and public policy, upon which no re-

covery could be had, moved the court to direct the jury to render a verdict in its favor. The court thereupon inquired of the plaintiff's counsel if they claimed or admitted that the statements which had been made were true, to which they replied in the affirmative. Argument was then had upon the motion, after which the court directed the jury to find a verdict for the defendant, which was accordingly done. Judgment being entered upon it, the case was brought to this court for review. The reversal of the judgment is sought for alleged errors of the court below in three particulars:

1st, In directing a verdict for the defendant upon the opening statement of the plaintiff's counsel;

2d, In holding that the question of the illegality of the contract could be considered in the case, the same not having been specially pleaded; and,

3d, In adjudging that the contract set forth in the opening statement was illegal and void.

Each of these grounds will be carefully examined.

1. Several reasons are presented against the power of the court to direct a verdict upon the statement of the facts which the plaintiff proposed to prove, that might be more properly urged against its exercise in particular cases. The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced. The question in either case must be whether the facts upon which it is called to instruct the jury be clearly established. If a doubt exists as to the statement of counsel, the court will withhold its directions, as where the evidence is conflicting, and leave the matter to the determination of the jury. * * *

2. The position of the plaintiff that the illegality of the contract in suit cannot be noticed, because not affirmatively pleaded, does not strike us as having much weight. We should hardly deem it worthy of serious consideration had it not been earnestly pressed upon our attention by learned counsel. The theory upon which the action proceeds is that the plaintiff has a contract, valid in law, for certain services. Whatever shows the invalidity of the contract, shows that in fact no such contract as alleged ever existed. The general denial under the Code of Procedure of New York, or the general issue at common law, is therefore sustained by proof of the invalidity of the transaction which is designated in the complaint or declaration as a contract.

Whilst, however, at the common law, under the general issue in *assumpsit,* it was always admissible to give in evidence any matter which showed that the plaintiff never had a valid cause of action, in practice many other matters were allowed under that plea, such as went to the discharge of the original cause of action, and showed that none subsisted at the commencement of the suit,—such as payment, release, accord and satisfaction, and a former recovery, and excuses for non-performance of the contract; and also that it had become impossible or illegal to perform it. 1 Chitty Pleading, 493; Craig v. The State of Missouri, 4 Pet. 410-426; Edson v. Weston, 7 Cow. (N. Y.) 278; Young v. Rummell, 2 Hill (N. Y.), 478. It followed that there were many surprises at the trial by defenses which the plaintiff was not prepared to meet. The English courts, under the authority of an act of Parliament passed in the reign of William IV., adopted rules which, to some extent, corrected the evils arising from this practice of allowing defenses under the general issue which did not go directly to the validity of the original cause of action. And the Code of Procedure of New York did away entirely with the practice in that State, and required parties relying upon anything which, admitting the original existence of the cause of action, went to show its discharge, such as a release or payment, or other matter,—to plead it specially, in order that the plaintiff might be apprised of the grounds of defense to the action. We do not understand that the code makes any other change in the matters admissible under the general denial.

But if we are mistaken in this view of the system of procedure adopted in New York, and of the defenses admissible according to it under a general denial in an action upon a contract, our conclusion would not be changed in the present case. Here the action is upon a contract which, according to the view of the judge who tried the case, was a corrupt one, forbidden by morality and public policy. We shall hereafter examine into the correctness of this view. Assuming for the present that it was a sound one, the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties. It was one which the court itself was bound to raise in the interest of the due administration of justice. The court will not listen to claims founded upon services rendered in violation of common decency, public morality, or the

law. History furnishes instances of robbery, arson, and other crimes committed for hire. If, after receiving a pardon, or suffering the punishment imposed upon him, the culprit should sue the instigator of the crime for the promised reward,—if we may suppose that audacity could go so far,—the court would not hesitate a moment in dismissing his case and sending him from its presence, whatever might be the character of the defense. It would not be restrained by defects of pleading, nor, indeed, could it be by the defendant's waiver, if we may suppose that in such a matter it would be offered. What is so obvious in a case of such aggravated criminality as the one supposed, is equally true in all cases where the services for which compensation is claimed are forbidden by law, or condemned by public decency or morality.

This doctrine was applied in Coppell v. Hall, reported in 7th Wallace. In that case Coppell was the acting British consul in New Orleans, and during the late civil war entered into a contract with one Hall, by which the latter agreed to furnish him with sundry bales of cotton, which he was to cause to be protected from seizure by our forces and transported to New Orleans, and there disposed of to the best advantage, he to receive one-third of the profits for his compensation. For breach of this contract he sued Hall, who set up that the contract was against public policy and void, and also a reconventional demand or counter-claim for damages for a breach of the contract by Coppell. On the trial, the court below, among other things, instructed the jury that if the contract was illegal, the illegality had been waived by the reconventional demand of the defendant; but this court said, speaking through Mr. Justice Swayne, that the instruction "was founded upon a misconception of the law." "In such cases," he added, "there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *ex dolo non oritur actio,* is limited by no such qualification." The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the

vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation." See also Holman v. Johnson, 1 Cowp. 341.

Approving of the doctrine so well expressed in this citation, our conclusion is, that the second position of the plaintiff is not well taken. * * *

Judgment affirmed.

TITLE GUARANTY CO. v. NICHOLS.

Supreme Court of United States, 1911. 224 U. S. 346.

MR. JUSTICE LURTON. Action upon a bond executed by the plaintiff in error to protect the Union Bank & Trust Company, of Phoenix, Arizona, against the dishonesty of its cashier. There were two or more renewals. Embezzlements by the cashier occurred during the currency of the bond. After a right of action had accrued, the bond was assigned to the defendant in error, who brought this action thereon.

The principal defense was that the loss was due to the neglect of the employer to supervise the conduct of the employé by making such monthly examinations of his accounts as it agreed to make or have made. There was a jury and verdict for the plaintiff, and a judgment against the Surety Company, which was affirmed by the Supreme Court.[3]

A number of errors have been assigned which relate to this defense, but the argument has turned upon those which in different ways, raise the question as to whether, after the defendant in error had made out a *prima facie* case by proving the bond and its breach by a refusal to indemnify him for losses sustained during its currency through the dishonesty of the employé guaranteed, the onus devolved upon the Surety Company to plead and prove that the loss had occurred through the fault of the employer in not making the monthly examinations which it had agreed to make. The trial judge ruled that the onus was

[3] Supreme Court of the Territory of Arizona.

upon the defendant, and this ruling has been affirmed by the Supreme Court.

Whether this ruling was right or wrong must depend upon whether the requirement of the bond, that monthly examinations of the books of the employé should be made, constituted a condition precedent or a condition subsequent. The bond on its face requires the employer "to take and use all reasonable steps and precautions to detect and prevent any act upon the part of the employé which would tend to render the company liable for any loss." It also provides that if the statements by the employer in the application "shall be untrue, the bond shall be void." The obligation in respect to examinations of the employe's accounts is found in the application. * * *

There was never any question but that liability under the bond would be defeated if it appeared that the loss attributable to the dishonesty of the employé was due to the neglect of the bank to make the monthly examinations required. And so the jury were instructed. The question was whether this requirement was a condition precedent to liability which the bank was required to aver and prove or whether it was a defense to be made out by the defendant. But a construction which makes the bond inoperative until the employer shows that it had made such examinations is not a fair and reasonable interpretation. The distinctions between conditions precedent and subsequent is plain enough. The condition here involved, if properly a condition at all, is of the latter class.

The coming into effect of a contract may be made to depend upon the happening or performance of a condition. But a condition subsequent presupposes a contract in effect which may be defeated by the happening or performance of a condition. Where, therefore, an action is upon a contract subject to a condition precedent, the performance of that condition must be averred and proved; but if the contract sued upon is subject to a condition subsequent, there is no occasion for any averment in respect to the condition. It is a matter of defense which must come from the other side. Chitty on Pleading, Vol. 1, pp. 246, 255.

The plaintiff was plainly entitled to recover upon proving the bond, an embezzlement and a breach, by a refusal to indemnify. It was not obliged to aver that it had made the examinations which it agreed should be made. If it had failed in that duty,

it was for the Surety Company to so plead and prove. Such, indeed, was the course of the pleading in this case, and a breach of the agreement to make such examinations was set up as a defense. There was no error in the ruling of the court that the onus was upon the Surety Company to prove a breach of the obligation to make such examinations. Piedmont & A. L. Ins. Co. v. Ewing, 92 U. S. 377; American Credit Indem. Co. v. Wood, 73 Fed. Rep. 81; Redman v. Etna Ins. Co., 49 Wisconsin 431; Murray v. N. Y. Life Ins. Co., 85 N. Y. 236; Freeman v. Traveler's Ins. Co., 144 Massachusetts 572. * * *

Judgment affirmed.

WEAVER v. BARDEN.

Court of Appeals of New York, 1872. 49 N. Y. 286.

Appeal from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order reversing a judgment in favor of defendant (which was entered upon decision of the court at Special Term), and directing a judgment in favor of plaintiff.

Action to compel a transfer of thirteen shares of the stock of the Knickbocker Stage Company of New York. The facts sufficiently appear in the opinion.

GROVER, J.[4] * * * The complaint, in substance, alleged facts showing, as claimed by the plaintiff, that he was the owner of thirteen shares of stock in an incorporated stage company in New York, which had been transferred to one L. J. Weaver, for the plaintiff, which the latter had transferred to defendant, as the defendant claimed, in payment of a debt due from the defendant[5] to him, and prayed that the defendant might me adjudged to assign and deliver such stock to the plaintiff and pay him the dividends received thereon. The answer was a general denial. To establish a cause of action, the plaintiff was bound to prove that he was the legal owner of the stock or equitably

[4] Statement condensed and part of opinion omitted.

[5] This is evidently a mistake, as it appears from other parts of the case that the claim was that L. J. Weaver was indebted to defendant. Ed.

entitled to the same as against the defendant under this answer; the defendant had the right to give evidence controverting any fact necessary to be established by the plaintiff to authorize a recovery, but not to procure a defense founded upon new matter. Upon the trial, it was proved by the plaintiff that one Finch had formerly owned the stock. That he assigned the same with other property to L. J. Weaver and one Hutchins, in trust for his creditors, of whom the plaintiff was one. That Finch compromised with his creditors thereafter, and made an agreement with the plaintiff to take the stock in question, in satisfaction of the balance of his debt. That under this agreement the stock in question was transferred to L. J. Weaver, the son of the plaintiff, and in some matters his agent in New York, with intent to satisfy the plaintiff's debt. That the plaintiff was ignorant of the stocks being transferred to L. J. Weaver, or of the same being placed in his name upon the books of the company. That L. J. Weaver subsequently transferred the same to the defendant, who refused to transfer the same to the plaintiff, upon being requested to do so or to account for and pay the dividends to the plaintiff. The facts proved showed that the legal title to the stocks was in L. J. Weaver. Finch, the former owner, had procured the same to be assigned to him by his trustee, without indicating any interest in any other person therein. It was registered in his name upon the books of the company; but the facts proved show that, as between him and the plaintiff, the equitable title was in the latter, for whom L. J. Weaver held the stock as trustee. That L. J. Weaver transferred the stock to the defendant, who claimed the title by virtue thereof. This established the plaintiff's right to the stock as against the defendant, unless he was a *bona fide* purchaser from L. J. Weaver. (Crocker v. Crocker, 31 N. Y. 507.) To meet this case, the defendant offered to prove in substance that he was a *bona fide* purchaser of the stocks from L. J. Weaver. The Special Term held, overruling the plaintiff's objection, that this was admissible under the answer. This was error. Under the general denial the defendant could not introduce evidence tending to show a defense founded upon new matter, but such only as tended to disprove any fact that the plaintiff must prove to sustain his case. The plaintiff was not bound to prove, for this purpose, that the defendant was not a *bona fide* purchaser for value of L. J. Weaver. It was enough for him to show his

equitable title to the stock in the first instance, and then it was incumbent upon the defendant to show that this equitable title was barred as against him. Showing that he was a *bona fide* purchaser from L. J. Weaver would bar this equity; but this was a defense founded upon new matter, and should have been set up in the answer, and then the plaintiff would, perhaps, have been prepared to meet it. Had the evidence been excluded by the Special Term, the defendant could, if so advised, have taken steps to procure an amendment of his answer, so as to make the defense admissible. Had the General Term reversed the judgment upon the ground that this defense was improperly admitted, a new trial should have been ordered to enable the defendant to procure such amendment, which the Special Term has power to grant, upon terms deemed reasonable. Had the General Term ordered a new trial and the defendant had appealed therefrom, the order must have been affirmed by this court, and judgment absolute for the plaintiff ordered. But the General Term did not order a new trial, but gave judgment absolute for the plaintiff. Such a disposition of the case can only be sustained when it is apparent that no evidence which the defendant can give, under any answer which the Special Term has the discretionary power to authorize, will establish a defense, when, as in the present case, the defendant has had no occasion to apply for the exercise of this discretion. * * *

Judgment reversed and new trial ordered.

LITTLE v. REED.

Supreme Court of Missouri, 1897. 141 Mo. 242.

BARCLAY, P. J. This action was begun April 19, 1895. The plaintiff is J. M. Little. The defendants are Jas. H. Reid, as administrator of the estate of Daniel Bentley, deceased, Matilda Bentley (the widow of Daniel), and Joseph Little. The objects of the action are to foreclose a mortgage or deed of trust conveying certain real estate, and to obtain a judgment for the debt thereby secured. The deed of trust in the nature of a mortgage, which is the foundation of the action, was executed by Daniel Bentley and his wife, Matilda, October 3, 1882, to secure a note

to plaintiff for $650, payable twelve months after date, with interest at eight percent per annum to be compounded annually. Joseph Little was named as trustee, with certain powers of sale in event of default. This deed of trust was properly recorded. The land conveyed thereby as security consisted of some ninety acres in Boone county.

June 8, 1892, Mr. Bentley died intestate. His widow remained in possession of the land; but no administration was had upon his estate until April 5, 1895, when the probate court ordered defendant Jas. H. Reid, to take charge as public administrator. The foregoing exhibits the special features of the petition, which in other respects states an ordinary case for the foreclosure of the mortgage. The trustee and the widow, who are defendants, filed no answer. The administrator defended. He admitted the death of Mr. Bentley and his own status as personal representative, but denied the other allegations of the petition. The answer also set up the following special defenses:

"And for his further answer, this defendant says that plaintiff is estopped from bringing or maintaining this suit for the reason that more than ten years have expired prior to the institution of this suit since the execution of the note and deed of trust described in plaintiff's petition, and that the same are now more than ten years old and are therefore barred by the statute of limitations of the State of Missouri, which this defendant sets up and pleads as a special defense in bar of plaintiff's recovery in this action. And this defendant would also plead and rely upon, as a special defense to the foreclosure of the deed of trust described in plaintiff's petition, the act of the General Assembly of the State of Missouri, passed and approved February 18th, 1891." The reply to the answer is a general denial.

At the trial defendant offered to prove that the deceased, Mr. Bentley, had been in adverse, open, notorious and peaceable possession of the premises in controversy, claiming the same against the interest of everyone, including plaintiff, from 1872 until his death in 1892. The learned trial judge, however, rejected that offer and excluded all testimony thereunder. It will not be necessary to go into further particulars of the trial. It will suffice to say that the court ultimately found for plaintiff, decreed a foreclosure, adjudged the sum of $1,729.75 to be due on the note secured, and directed the demand to be certified to the probate court for allowance of any residue that might remain due, after

the foreclosure sale which was decreed. The defendant appealed from the decree, after certain motions and other steps in the circuit court.

The only question we shall touch at this time is whether or not this court has jurisdiction of this appeal. Counsel appear entirely willing to have the merits considered here. But it is part of our duty to observe the limitations on our authority, and hence to examine into the questions just stated. McGregor v. Pollard (1895) 130 Mo. 334 (32 S. W. Rep. 640.)

We discern no ground on which jurisdiction over this case can be maintaind by this court. The only class of cases belonging here that might possibly be suggested as including the case at bar is the class "involving title to real estate." Const. 1875, art. 6, sec. 12. But it has been often declared that title is not involved in a mere suit to foreclose a mortgage. State ex rel. v. Court of Appeals (1877), 67 Mo. 199; Pinneo v. Knox (1881), 100 Ill. 471; Bailey v. Winn (1890), 101 Mo. 649 (12 S. W. Rep. 1045); Barber Pav. Co. v. Hezel (1897), 139 Mo. 228 (39 S. W. Rep. 781).

The defenses put forward by defendant in his answer only assert that the foreclosure is barred by the limitation law. The offer of defendant to show adverse title (as against the mortgage) was beyond the issues of the pleadings. The plaintiff objected to entering that foreign field, and the court sustained the objection. The rejected offer cannot be properly held to have enlarged the paper issues in the case. The general denial in the answer did not raise an issue of title in a case of this sort. Nor could that issue be projected into the cause at the trial, in the manner attempted, against the protest and objection of the plaintiff.

It is true that, in actions of ejectment title[6] by adverse pos-

6 Paige, J., in Lain v. Shepardson, 23 Wis. 224, (1868): * * * "The complaint in an action to recover real estate is general. It does not set forth the plaintiff's title, but simply alleges ownership and a right to the possession. Under this he is allowed to show any title that he can. And from the necessity of the case, the defendant, under a mere denial, must be allowed to prove anything tending to defeat the title which the plaintiff attempts to establish. He cannot be bound to allege specific objections to a title which the complaint does not disclose, and which he may have no knowledge of until it is revealed by the evidence on the trial." * * *

See also Phillips v. Hagart, 113 Cal. 552, (1896), that an answer

session may be shown under a general denial of the allegation of title in plaintiff. That rule must be accepted as settled by a line of decisions in this State. Nelson v. Bradhack (1869), 44 Mo. 596; Bledsoe v. Simms (1873), 53 Mo. 307; Stocker v. Green (1888), 94 Mo. 280 (7 S. W. Rep. 279). But the proposition established by those decisions gives no sanction to the wide extension of its application sought by the defendant here. Under the answer (of which a part has been above quoted) the deed of trust must be considered admitted. The present right to enforce it is disputed owing to the lapse of time, but its original effect as a conveyance of the title is plainly conceded. Such is a fair and reasonable interpretation of the answer of the administrator. The other defendants admitted the plaintiff's entire contention by their default. In that state of the pleadings the offer of proof of an adverse title was clearly irrelevant. It was not admissible under the principles of pleading discussed in the group of precedents last cited, nor for any reason that has as yet been suggested.

In our judgment the Supreme Court has no jurisdiction of this appeal. It is therefore certified to the Kansas City Court of Appeals. Macfarlane, Robinson and Brace, JJ., concur.

JOHNSON v. OSWALD.

Supreme Court of Minnesota, 1888. 38 Minn. 550.

GILFILLAN, C. J.: This action was for conversion of personal property. The complaint alleges, generally, without referring in any way to the means by which he acquired title, that the chattel was the personal property of the plaintiff, and that he was in possession of it, and that the defendants caused it to be wrongfully taken from him. The answer is a general denial. The defendants offered to prove in substance that they, owning the chattel, were induced to sell to one Larson, from whom plain-

setting up defendant's title in an action of ejectment amounts to no more than a denial of plaintiff's title. And so in Dale v. Hunneman, 12 Neb. 221, (1881), any matter admissible under a general denial in an action of ejectment, which goes to show the plaintiff without right to possession."

tiff claims to derive his title, by his (Larson's) false and fraudulent representations, and that upon discovering the fraud they rescinded the sale, and retook the chattel. There was already in the case evidence sufficient to go to the jury that plaintiff was not a *bona fide* purchaser of Larson's title. The court below excluded the evidence so offered.

The question raised is, can a defendant in an action for conversion, where the complaint contains only the simple allegation of title in plaintiff, prove under a general denial that the sale under which plaintiff claims title was void so as to pass no title by reason of fraud? The general rule is that "anything that tends to controvert directly the allegations in the complaint may be shown under the general denial." Bond v. Corbett, 2 Minn. 248 (Gil. 209). Upon this rule it is held that in an action in replevin or for conversion[7] a denial of the simple allegation of plaintiff's title will admit proof of title in defendant or a third person—Caldwell v. Bruggerman, 4 Minn. 70 (Gil. 190); Jones v. Rahilly, 16 Minn. 320 (Gil. 283); McClelland v. Nichols, 24 Minn. 176; Robinson v. Frost, 14 Barb. 536; Davis v. Hoppock, 6 Duer 254; Emerson v. Thompson, 18 N. W. Rep. 503—for such proof directly controverts the allegation of plaintiff's title in the complaint. In the case of a sheriff, defendant, who seeks to justify his taking under process, on the claim that the sale to plaintiff was in fraud of the creditors of the person against whom the process runs, it has been held that a general denial of plaintiff's title is not sufficient. Frisbee v. Langworthy, 11 Wis. 375. This rule in this state, in the case of an officer justifying under process is stated in Kenney v. Goergen, 36 Minn. 190 (31 N. W. Rep. 210), to be that under the denial of plaintiff's title, and the allegation of title in the person against whom the process runs, he may, without specially pleading it, show fraud as to creditors in the sale by such person to plaintiff. There is some reason for requiring from the officer in such a case somewhat fuller pleading than from the defendant in a case like this. A sale in fraud of creditors is valid and effectual, and passes the

[7] At common law the action of trover apparently did not admit of a true plea in justification or excuse, because all such defences resolved themselves into either a denial of plaintiff's right to immediate possession, which was implied in the declaration, or a denial that the acts of the defendant amounted to a conversion, Dorrington v. Carter, 1 Exch. 566, (1847); Young v. Cooper, 6 Exch. 259, (1851).

title as between the parties. Only creditors who are defrauded by it can avoid it, and there is some reason for requiring one who seeks to avoid it to put himself in the place of a defrauded creditor. But in a case like this, if the facts be as defendant sought to prove them, the sale was void, and Larson got no title. As between the parties to the sale and to the action, it remained in defendant, unless plaintiff is a *bona fide* purchaser. A general denial puts in issue only the facts alleged in the complaint. Thus, if this complaint, instead of alleging plaintiff's title, had alleged the facts through which it was derived, as had it alleged the sale by defendant to Larson, and title derived by plaintiff from him, a general denial would enable defendant only to disprove those facts, but not to prove other facts to vary their legal effect. In such case the fraud could not have been proved without pleading it. The case would then have been analogous to Finley v. Quirk, 9 Minn. 194 (Gil. 179), in which a denial of the sale of a horse was held to raise an issue only on the sale in point of fact, and did not justify evidence that it was made on Sunday, so as to be illegal. Under the denial in that case the defendant might have followed any line of evidence that would have disproved the sale in point of fact. So, under a denial of the pleadable fact of title, the defendant may introduce any evidence that will disprove such alleged fact. In many cases it might put a defendant to great disadvantage if, when the complaint alleges only the fact of title, without disclosing by what means plaintiff claims to have acquired it, defendant must anticipate plaintiff's evidence as to the source of title, and plead expressly facts to do away with the effect of it.

It was error to exclude the evidence offered, and there must be a new trial.

Order reversed.

RICHTMEYER v. REMSEN.

Court of Appeals of New York, 1868. 38 N. Y. 206.

Action to recover of the defendant, sheriff of Kings County, the amount of an execution against one Searle, issued out of the Supreme Court against the body of the judgment debtor, and

delivered to the defendant for collection. The defendant arrested Searle, and duly admitted him to the liberties of the jail of Kings County. Searle, after being so admitted, escaped therefrom to the city of New York, and while so absent therefrom, this action was commenced. The defendant, in his answer, alleged that he had admitted Searle to the liberties of the jail, and that Searle, after his escape therefrom, voluntarily returned thereto before the commencement of the action. At the close of the plaintiff's case, the defendant moved for a nonsuit, upon the grounds, first, that the judgment-roll failed to show that the execution against the body of Searle was authorized; second, that it appeared from the evidence, that Searle was detained off from the limits by the fraud and connivance of the plaintiff. The motion was denied, and the defendant's counsel excepted. The defendant's counsel then offered to prove that Searle would have returned to the jail limits before the commencement of the action had he not been prevented from so doing by the fraudulent acts of the plaintiff's agents. This evidence was objected to and rejected, upon the ground that no such defense was set up in the answer, and the defendant's counsel excepted. The defendant's counsel moved to amend the answer by alleging the above facts. The motion was denied, and the defendant's counsel excepted. The defendant's counsel excepted generally to the charge to the jury. The jury found a verdict for the plaintiff, and ordered the exceptions to be first heard at the General Term. The exceptions were heard, and judgment for the plaintiff ordered upon the verdict, from which judgment the defendant appealed to this court.

GROVER, J.: The judgment record in the action of the plaintiff against Searle showed that one Johnson had a cause of action against the former for the conversion of personal property; that Johnson assigned such cause of action to the plaintiff, who commenced the action thereon as assignee against Searle, and recovered the judgment upon which the execution was issued. The ground of objection to the record was, that the cause of action was not assignable. There are two answers to this: First, the objection, if available, could only be taken in the action against Searle. The recovery of the judgment in that case is conclusive upon the right of the plaintiff thereto upon the parties in this action. Second, the cause of action thereon was assignable, and the assignee could maintain an action thereon in his own name.

(Haight v. Hoyt, 19 N. Y. 464.) A recovery of judgment for the conversion of personal property authorizes an execution against the person of the defendant. (Wessen v. Chamberlin, 3 N. Y. 331.) The only remaining question in this case is, whether the defense, that Searle would have returned to and upon the liberties of the jail before the commencement of the action, had he not been prevented by the fraud of the plaintiff, was inadmissible under the answer, no such ground of defense having been alleged therein. The escape in the present case was negligent. In such cases, recaption before suit brought is a defence, and if such recaption is prevented by the fraud of the plaintiff or his agent, that, also, would constitute a defense to the action. A voluntary return of the debtor into custody before suit brought, is equivalent to and constitutes a recaption by the sheriff. There is no dispute as to those rules of law. The question is, whether these grounds of defense must be set up in the answer. The code (§ 249) provides that the answer must contain, first, a general or specific denial of each material allegation of the complaint controverted by the defendant, etc.; second, a statement of any new matter constituting a defense, etc. The question then is, whether the defense offered consisted of new matter, or whether it merely disproved any of the material allegations of the complaint. All that the plaintiff must allege and prove, to maintain his action, is the recovery of the judgment, the issuing and delivery of the execution to the sheriff, the capture of the debtor by the sheriff upon the execution, and the escape from custody before suit brought against the sheriff therefor. We have seen that the sheriff may defend the action by proving a recaption of the defendant before suit brought, or facts legally excusing him from making such recaption. Proof of such facts do not controvert any allegation of the complaint. It is, therefore, new matter constituting a defense to the action, and, under the Code, is inadmissible, unless set up in the answer. The court, therefore, correctly held that the proof offered was inadmissible under the answer. The motion of the defendant, made upon the trial for leave to amend the answer, was addressed to the discretion of the court, and its exercise cannot be reversed by this court. The answer does not contain a general denial,[8] and, therefore, the question does not arise whether the

[8] Where the answer contains no general or specific denial, but sets up an affirmative defence, all material allegations of the complaint

provision of the Revised Statutes, authorizing public officers, under the plea of the general issue, to give any defense in evidence, is repealed by the Code. There was no legal error committed in excluding the defense in this case.

Judgment affirmed.

SPARLING v. CONWAY.

Supreme Court of Missouri, 1882. 75 Mo. 510.

HOUGH, J.: This was an action for malicious prosecution. The answer was a general denial, and the defense relied upon at the trial was, that the defendant acted in good faith upon the advice of competent counsel. There was a verdict and judgment for the defendant, which was affirmed by the court of appeals.

The plaintiff contends that the defense stated should have been pleaded in order to be made available by the defendant. We are of a different opinion. The testimony offered and received on this subject was admissible to disprove the allegation of malice contained in the petition and sought to be established by the plaintiff, and if the defendant had set it forth in his answer, he would only have pleaded his evidence.[9] * * *

Judgment affirmed.

LANGTON v. HAGERTY.

Supreme Court of Wisconsin, 1874. 35 Wis. 150.

Action for slander. The complaint states five counts or causes of action, charging the speaking of the same words, substan-

stand admitted. Marshall v. Fire Ins. Co., 43 Mo. 586, (1869).

9 For the same reason probable cause may be proved under a general denial, Kellogg v. Schurman, 18 Wash. 293, (1897).

Compare the rule that in actions for false imprisonment, the defence of probable cause to arrest on suspicion must be specially pleaded, S. S. Co. v. Williams, 69 Ga. 251, (1882); Scheer v. Keown, 34 Wis. 349, (1874); Panjiris v. Hartman, 196 Mo. 539, (1906).

tially, but at different times, and in the presence and hearing of different persons. The introductory averments and the innuendoes are the same in each. Hence, a perusal of one count will show the structure of the whole complaint. The first cause of action is as follows: "That on or about the 12th day of October, 1872, at the city of Green Bay, in said Brown county, the defendant, wilfully and maliciously designing and intending to injure and degrade this plaintiff in his character, and to bring plaintiff into public infamy and disgrace, wilfully and maliciously spoke, published and declared of and concerning this plaintiff, in the presence and hearing of one N. L. Barber and divers other persons, the false, scandalous and defamatory words following, to-wit: 'He (meaning the plaintiff) murdered the man (meaning one Michael Nehill), and stole all of his money from him, and I saw him do it,' meaning, intending and charging thereby, that this plaintiff had been guilty of the crimes of murder and larceny; that plaintiff was thereby greatly injured in his good name, fame and character, to his damage three thousand dollars."

Each count is separately answered; but, except the reference in each to the number of the count which it purports to answer, the answers are alike. Each contains a general denial of the allegations of the count to which it responds, and, in addition thereto, the following averments: "And for a further answer to the plaintiff's (first) alleged cause of action, the defendant avers that before the speaking of the words, 'he murdered the man,' complained of, to-wit, on or about the 7th day of December, 1868, at the city of Green Bay, Brown county, in this state, the plaintiff above named did shoot and kill one Michael Nehill, and whatever was said by the defendant in relation to the killing of the said Michael Nehill as aforesaid, was said to the plaintiff personally, believing the same to be true, and without any malice towards the plaintiff or design to do him injury in his good name, fame, credit or otherwise." The whole answer concludes with a notice applicable to each particular answer, which is as follows: "All of which above facts the defendant will give in evidence on the trial of this action in mitigation of any damage the said plaintiff may by law be entitled to recover therein."

* * *

The jury found for the plaintiff, and assessed his damages at $500. A motion to set aside the verdict and for a new trial

was denied by the court, and judgment was duly entered for the plaintiff pursuant to the verdict.

The defendant appealed to this court.

LYON, J.: * * * Under the pleadings it was not a question for the jury whether the killing of Nehill was a justifiable or a felonious homicide. The defendant did not aver in his answer the truth[10] of the words spoken by him; and, failing to do so, he is precluded, by well-settled rules of law, from proving that they were true. He is, therefore, in precisely the same position as though he had expressly admitted in his answer that such killing is not murder. Further, we held in Wilson v. Noonan,[1] [35 Wis. 321] that extrinsic facts upon which the defendant relies to mitigate the damages, must be stated in the answer, or they will not be available to him. The answer does not aver that the killing of Nehill, if not murder, was manslaughter. Under the pleadings, all that the court could do was to submit it to the jury to say from the evidence whether, in view of all the circumstances, the defendant could honestly have believed, and whether he did believe, when he spoke the words, that the plaintiff had been guilty of the crimes charged against him. The court so instructed the jury in substance and effect, and properly refused to submit to them the question of the character of the homicide, whether justifiable or criminal.[2]

A very considerable portion of the charge to the jury was in strict accordance with the rules of law above stated, and that portion requires no further notice. * * *

Judgment affirmed.

10 It has been held that a general allegation that the words were true is insufficient and that the facts must be specifically stated, Wachter v. Quenzer, 29 N. Y. 547, (1864); Bingham v. Gaynor, 203 N. Y. 27, (1911).

1 At common law the truth of the words could not be shown in mitigation under the general issue, Smith v. Richardson, Willes, 20, (1737).

2 And so in Donaghue v. Gaffy, 53 Conn. 43, (1885), though it was urged by counsel that since the complaint alleged that the words were false, the general denial ought to put that allegation in issue.

NICHOLS v. WINFREY.

Supreme Court of Missouri, 1883. 79 Mo. 544.

PHILLIPS, C.: This action was begun by Josephine Steinbeck, as the widow of James Steinbeck, deceased, for the malicious, wrongful, and unjustifiable killing of her said husband in Chariton county on the 17th day of July, 1876. The plaintiff has since intermarried with W. H. Nichols. The answer contained a general denial, and then pleaded that the killing was done in the necessary defense of defendant's person, and in the defense of his house, then occupied by defendant, after being assaulted therein by deceased. The venue of the cause was transferred, at plaintiff's instance, to Livingston county, where, on trial before a jury, the plaintiff recovered judgment for $2,500, from which the defendant has appealed to this court. The controlling features of the evidence, as also the instructions to be reviewed will appear in their proper connection in the course of this opinion.

* * *

The defendant complains of the fourth instruction conceded to the plaintiff, in which the jury were told "that before they can find for the defendant on the ground of self-defense, it devolves upon him to establish, by a preponderance of the testimony, that, at the time he shot and killed Steinbeck, Winfrey had reasonable cause to apprehend a design on the part of Steinbeck to do him some great personal injury, and had also reasonable cause to apprehend immediate danger of such design being accomplished."

It is unnecessary to the decision of the propriety of this instruction, as applied to the facts of this case, to pass on the question as to whether the burden of proof in this character of action rests throughout and to the same extent on the plaintiff, as it does on the prosecution in a criminal case. It may be affirmed that the prosecutor, under the statute for the recovery of damages, is not held to the establishment of the defendant's guilt beyond a reasonable doubt. He is only required to make out his case by a preponderance of the evidence to the satisfaction of the jury.

The allegation of the petition is that the defendant, "with force and arms, violently, maliciously, unlawfully, and wrongfully, without any just cause, did shoot the said James Stein-

beck." The answer denied generally the allegations of the petition, and then in the form of new matter pleaded that the act was done in self-defense and in defense of defendant's house, in which he was unjustifiably being assaulted by the deceased. This apparently new matter, however, was in legal effect embraced in the general denial, and would have been admissible in evidence thereunder. These matters, too, were covered by the averments of the petition. To maintain the issues on the plaintiff's part she could not have stopped in her evidence by merely proving that defendant shot and killed her husband; for by the terms of the statute[3] under which she sought to recover, the killing must have been wrongful, and the allegations of the petition were that the killing was malicious, wrongful, and without just cause.[4] * * *

Judgment reversed.

[3] "Whenever the death of any person shall be caused by the wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured." Mo. R. S. 1879, sec. 2122. Another section gives the right of action to the husband or wife of the deceased person.

[4] Compare Thayer, J., in Konigsberger v. Harvey, 12 Or. 256, (1885): * * * "The answer, in legal effect, merely controverts the assault and beating without cause and provocation, or with intent to injure, hurt, and damage the plaintiff. Strictly construed, it tendered no issue to the cause of action alleged in the complaint. It admits really that the respondent beat the appellant, but denies that it was without cause or provocation, or with intent to injure, etc. The respondent's attorneys very probably supposed that by denying the wrong they would be admitted to justify the act. But parties cannot justify in that way. It does not present the facts upon which justification is claimed—does not show why the beating was not wrongful. The facts must be averred in such cases constituting the justification, and in such a manner that the court can judge that the party was not in the wrong. The party's assertion that the act was not wrongful is no fact; and that is all the denial amounts to. They doubtless fell into the error in consequence of a misapprehension of the effect of the adoption of the Civil Code. It is too often regarded as an original system of practice and pleadings, when in fact it is more a change of the form of an existing system.

The case at bar may serve as an illustration. The appellant alleges that the respondent assaulted and

CUNNINGHAM v. LYNESS.

Supreme Court of Wisconsin, 1867. 22 Wis. 245.

Action to recover damages for injuries to the plaintiff from being forced from a pier into the Fox river at the city of Oshkosh, in consequence, as is averred, of defendant's negligence while driving a wagon from the ferry-boat on to the pier. Answer, a general denial, with notice that defendant would show that the injury was caused by the negligence of one Coughran, the improper construction of the pier, and the improper management of the ferry-boat. The facts proven and the instructions given and refused by the court, will sufficiently appear from the opinion. Verdict for the plaintiff; new trial denied; and judgment on the verdict; from which the defendant appealed.

COLE, J.—On the trial, the court was requested on behalf of the defendant to instruct the jury, that if they should find from the evidence that the defendant did not use the ordinary care and diligence, still if they found that the plaintiff, Mrs. Cunningham, in occupying the position she did upon the wharf, was guilty of negligence, and that such negligence on her part essentially contributed to the injury, then they must find for the defendant. This instruction the court refused to give, and

beat him; the respondent claims that what he did was in attempting to repel an assault made by the appellant. He is not able, truthfully, to deny that he did beat and strike the appellant, but claims to be able to prove that the appellant made the first assault, and that he only acted in self-defense. The law upon that subject is the same as it was 500 years ago. The right of self-defense is a natural right, inherent in mankind, though the mode of presenting the defense has been changed somewhat. Under the practice that formerly prevailed, it would have been presented by a plea of son assault demesne, in which the facts would have been stated with much formality and great precision. The Code has dispensed with a good deal of the formality, but requires the facts which constitute the defense to be set forth in the form of an answer, under the head of new matter. It is new, because it is not embraced in the statement of facts made by the appellant in his complaint. (Pom. Rem. § 691) The reason why the facts constituting such a defense are required to be set forth in some form is the same now as it was when pleadings were first devised. It is in order to apprise the opposite party of what he must be prepared to confront, so that he will not be taken by suprise.'' * * * See also Barr v. Post, 56 Neb. 698, (1898).

to the refusal an exception was taken. It seems to us that the instruction was correct in terms as asked, and was strictly pertinent to the issue in the case. * * *

But it is further insisted that the plaintiffs were entitled to recover in the action, because the defense set up in the answer and attempted to be proved, excluded all pretense of negligence on the part of Mrs. Cunningham. It is true that it is stated in the answer, by way of notice, that the injury to Mrs. Cunningham was produced by other causes; such as the want of care on the part of Coughran; defect in the ferry landing; and carelessness on the part of the employees of the city in the management of the ferry. But there is likewise the general denial, which put in issue the right of the plaintiff to recover. It was not necessary to state in the answer that the injury was caused by the negligence of Mrs. Cunningham, or by both her negligence and that of the defendant; since this would merely amount to the general issue. Potter, Adm'r, etc. v. The Chicago & Northwestern R. R. Co., 20 Wis. 533.[5] If, therefore, there was any fact or circumstance which tended to show that the injury arose partly by the negligence of Mrs. Cunningham, the defendant was entitled to proper instructions in view of any such evidence. For that fact, if established to the satisfaction of the jury, would be an answer to the action. So, notwithstanding the unnecessary matter stated in the answer, one of the issues was, whether the plaintiff, Mrs. Cunningham, by her carelessness and improper conduct, contributed to the injury or not.[6]

5 Ante, p. 342.

6 Acc. Harper v. Holcomb, 146 Wis. 183, (1911); Wieland v. D. & H. Canal Co. 167 N. Y. 19, (1901), semble. But see sec. 841b, N. Y. Code Civ. Proc. requiring contributory negligence to be pleaded and proved by the defendant in actions under the death statute. A number of Wisconsin cases seem to place the burden of proof on the defendant, but whether it is the shifting burden of producing evidence or the ultimate burden of convincing is not clear, Sweetman v. Green Bay, 147 Wis. 586, (1911), especially dissenting opinion of Marshall, J.

The Federal courts follow the Supreme Court of the United States in placing the burden of proof on the defendant, but allow the defence under a general denial where that is sanctioned by the state practice, Ry. Co. v. Darnell, 221 Fed. 191, (1915). In England it appears to have been assumed that in an action on the case for negligence, the plaintiff's case consisted of two propositions: 1, that he was injured as a result of defendant's negligence; 2, that he was

We are, therefore, of the opinion that there must be a new trial.

Judgment reversed.

HUDSON v. WABASH RY. CO.

Supreme Court of Missouri, 1890. 101 Mo. 13.

This was an action for damages for personal injuries resulting from the alleged negligence of the defendant. There was a verdict and judgment for the plaintiff, from which the defendant appealed.[7]

SHERWOOD, J. * * *

The petition, after certain recitals as to the defendant being a railroad corporation, sets forth certain ordinances of the city, then states: * * * That by reason of said careless and negligent acts of defendant, the plaintiff, without any fault on his part, was caught between two of said cars, then and there, and had his foot smashed, torn and broken, so that he has since then been unable to work, to his loss and damage. * * *

The answer was as follows:

Defendant denies each and every other allegation contained and set forth in plaintiff's said petition. Wherefore, having fully answered, defendant prays to be discharged with its costs." * * *

It is the unquestioned law of this state that contributory negligence is strictly an affirmative defense; and, in order to avail a defendant as a matter of *pleading*, it must be affirmatively

free from contributory fault.

Brett, M. R., in Wakelin v. L. & S. W. Ry. Co., 55 L. T. R. 709, (1886): * * * "According to the English law the cause of action in such a case was not that the accident was caused by the negligence of the defendant, for if the plaintiff was guilty of contributory negligence, there was no cause of action. The cause of action was that, as between the plaintiff and defendant, the accident was caused solely by the negligence of the defendant, without any contributory negligence." In the House of Lords the case went off on another point, but considerable doubt was thrown on this view, Wakelin v. L. & S. W. Ry. Co., 12 A. C. 41.

[7] Statement condensed and part of opinion omitted.

pleaded.[8] O'Conner v. Railroad, 94 Mo. 155, and cas. cit.; Donovan v. Railroad, 89 Mo. 147; Schlereth v. Railroad, 96 Mo. 509. The contention is, however, made by the defendant that as the petition amongst other things alleged concerning plaintiff, "that by said negligent acts, and *without any fault on his part*, he was then and there caught between two of said cars," etc., and the answer denied this averment, that therefore the defense of contributory negligence was raised. This is a mistake. True, the case of Karle v. Railroad, 55 Mo. 482, apparently supports this contention, but the utterance there was only *obiter* and should not be regarded as possessing any authoritative value.

Besides, under our rulings, there was no manner of necessity for the petition to contain the allegations that the injuries were done to plaintiff "without any fault on his part." This follows as a corollary from the necessity of the defendant setting forth such a defense in his answer; the rule of the code being that "the defendant, by merely answering the allegation in the plaintiff's petition, can try only such questions of fact as are necessary to sustain plaintiff's case.[9] If he intends to rely upon

[8] Walker, J., in K. C. R. R. Co. v. Crocker, 95 Ala. 412, (1891): "The term 'contributory negligence', instead of implying such a denial of the material allegations of the complaint as is made by pleading the general issue, implies, just the contrary. The theory of this special defense is, that the defendant was negligent, but that the negligence of the plaintiff conduced to the injury complained of. The defense is in the nature of a confession and avoidance. It may be fully made out without denying a single allegation of the complaint. The pith of it is, that admitting that the defendant was negligent as charged, yet the plaintiff is not entitled to recover because his own negligence proximately contributed to the injury. The plea of contributory negligence, when standing by itself, admits the negligence charged in the complaint. L. & N. R. R. Co. v. Hall, 87 Ala. 708; Carter v. Chambers, 79 Ala. 229; Geo. Pac. Railway Co. v. Lee, 92 Ala. 270. Now, the very essence of the general issue is a denial of all the material allegations of the complaint. When negligence is counted on, the fact of negligence is certainly denied by the general issue. The same words can not at once be a denial and an admission of the same thing. The statutory general issue does not palter in a double sense."

[9] It has been held in a number of cases that a plea to the effect that the injury was caused by the plaintiff's own negligence, does not amount to a plea of contributory negligence, but is a mere argumentative denial. Birsch v. Electric Co., 93 Pac. 940, (Mont. 1908). Vallaint, J., in Allen v. Transit Co., 183 Mo. 411, (1904): * * *

"If the facts stated in the plea

new matter which goes to defeat or avoid the plaintiff's action, he must set forth in clear and precise terms each substantive fact intended to be so relied on. It follows that whenever a defendant intends to rest his defense upon any fact which is not included *in the allegations necessary to the support of the plaintiff's case,* he must set it out according to the statute in ordinary and concise language, else he will be precluded from giving evidence of it upon the trial." Northrup v. Ins. Co., 47 Mo. 444. That case was cited and approved in Kersey v. Garton, 77 Mo. 645. * * *

But while contributory negligence as a matter of defense has to be pleaded in order for a defendant to avail himself of it, by the introduction of evidence to sustain that issue, yet it does not thence follow that if the plaintiff's own testimony shows circumstances of contributory negligence which absolutely defeat his right of action and disprove his own case, that the defendant is not at liberty to take advantage of such testimony though produced by the adversary. On the contrary, it is well settled in this state, as well as elsewhere, that such advantage may be taken of the plaintiff's testimony, regardless of whether the special defense be pleaded or not.[10] Milburn v. Railroad, 86 Mo. 104, and cases cited; Schlereth v. Railroad, 96 Mo. 509. * * *

Judgment reversed.[1]

only go to show that it was the plaintiff's own negligence and nothing more that caused the accident those facts could be proven under the general denial, because if it was the plaintiff's negligence only, it was in no part defendant's negligence. Under a general denial the defendant may prove any fact which shows that the plaintiff never had any cause of action. But where an affirmative defense is offered it logically carries the idea that a cause of action once existed, but has ceased because of the facts pleaded in the answer or that a cause of action would have arisen out of the facts set out in the petition but for the additional contemporaneous facts pleaded in the answer."

[10] For another variation, see Hill v. Minneapolis St. Ry. Co., 112 Minn. 503, (1910), to the effect that contributory negligence must be specially pleaded by the defendant unless the complaint negatives it.

[1] The judgment was reversed on the ground that the verdict should have been directed for defendant on the plaintiff's evidence establishing contributory negligence.

The rule that a verdict may be directed for the defendant on an unpleaded defense clearly proved by the plaintiff's own evidence is well settled in Missouri, and in a

KAMINSKI v. TUDOR IRON WORKS.

Supreme Court of Missouri, 1901. 167 Mo. 462.

ROBINSON, J.—This is a suit by plaintiff to recover damages for the loss of a thumb alleged to have been caused by the negligence of defendants. The negligence charged in plaintiff's petition is twofold: first, the failure of defendant to provide a reasonably safe appliance with which to do the work he and others engaged with him were required to perform, in this, that the derrick or hoisting machine (at which he and his co-laborers were working) was not furnished with a brake-dog to arrest or stay the load that was placed upon its arms or crane, while being hoisted or lowered by use of the machine; and, secondly, because of the failure of defendant to furnish a sufficient number of men to operate the derrick when so heavily loaded, as upon the occasion of plaintiff's injury. The answer is a general denial with a plea of contributory negligence on the part of the plaintiff. The case was tried by a jury under instructions from the court, and resulted in a verdict and judgment for defendant, and plaintiff, after the usual steps taken, has brought the case here for a review. * * *

It is furthermore urged by the appellant that the court erred in the giving of instruction numbered 3, because the defendant did not plead in its answer as a defense to plaintiff's cause of action that the act of a fellow-servant or fellow-servants with plaintiff contributed to his injury; that as defendant had not raised that issue by the pleadings, it was not entitled to have the question submitted to the jury by instruction.

Plaintiff's argument, and the citation of authorities offered to sustain his position in this regard, shows that he erroneously likens the negligence of a fellow-servant to contributory negligence on part of plaintiff. In this he is clearly wrong. The two defenses are widely dissimilar. The defense of "contributory negligence" on part of a plaintiff, interposed by a defendant, is in the nature of a plea in confession and avoidance, and it has been held for that reason by this court, it must be specially pleaded by a defendant to be availing to him. The plea im-

number of the other states. For the contrary view, see Mulry v. Mohawk Ins. Co., 5 Gray, 541, (Mass. 1856).

pliedly admits some negligence on part of the defendant, but seeks to avoid its consequence by charging that plaintiff himself contributed to the injury complained of. It is a matter pleaded by defendant to avoid the consequences of his own act, and for that reason, the rule has been adopted that it must be specially pleaded by defendant. Upon the other hand, the defense that plaintiff's injuries received, were caused by the negligence of a fellow-servant, does not admit any negligence on the part of the defendant, but strikes at the very root of plaintiff's cause of action and disposes of it if true.

The averment of an answer, that another, or others than defendant, did the act of which defendant is charged with having done to the injury of a plaintiff, is nothing more than a denial of the averments of the petition, that defendant is guilty of the charges made, as the basis of plaintiff's cause of action; and the rule has ever been that anything may be shown under a general denial which tends to prove that the cause of action stated never existed. (Bliss, Code Pleading, par. 352.)

The reason for a special plea, as in confession and avoidance, fails entirely of application in a case where a defendant relies upon the fact, as here, that it did not do the act charged, and as proof of that fact, shows that another, for whose act defendant is not responsible to plaintiff, did the wrong charged to defendant.[2]

Finding no error in the action of the trial court, its judgment is affirmed.

DUFFY v. CONSOLIDATED COAL CO.

Supreme Court of Iowa, 1910. 147 Ia. 225.

This is an action for personal injuries. There was a verdict and judgment for the plaintiff. Defendant appeals.

EVANS, J. * * *

Appellant complains because the trial court failed to instruct the jury on the subject of assumption of risk. Appellant sub-

2 Acc. Wilson v. Ry., 51 S. C. 79, (1897) Contra: Laying v. Mt. Shasta Spring Co., 135 Cal. 141, (1901).

mitted to the trial court three instructions on the subject, which the trial court refused. The first of these requested instructions laid upon the plaintiff the burden of proving that he did not assume the risk involved in passing through the entry at the place of injury. This was clearly erroneous as an abstract proposition. Assumption of risk is an affirmative defense, and the burden is upon the defendant to plead it and prove it.

Assuming that the other two instructions asked on the subject were correct as abstract propositions of law, they were properly refused because the defendant had not pleaded such defense. The only reference to the subject contained in its answer is the following: "Defendant further states that whatever injuries if any, the plaintiff received were such as he assumed the risk of in his employment by the company." The term "assumption of risk" has come to be used in a twofold sense. It is often said that an employee assumes the ordinary risk that is incident to his employment. This form of assumption of risk is often pleaded by defendants in personal injury cases, although it is quite unnecessary to do so. Assumption of risk in its true sense has reference to those risks arising out of the negligence of the master when such negligence is known to the employee, and the danger therefrom appreciated by him. In the first form herein indicated a specific pleading of assumption of risk of the ordinary dangers incident to an employment is a mere amplification of the general denial,[3] and adds nothing to it in a legal sense. In the second form herein indicated it is an affirmative defense, and must be specially pleaded as such. Sankey v. R. R. Co., 118 Iowa 39; Mace v. Boedker, 127 Iowa 731; Martin v. Light Co., 131 Iowa 734; Beresford v. Coal Co., 124 Iowa 39. The most that can be said of defendant's pleading in this respect is that it sets up an assumption of risk in the first form. There is no suggestion in it that plaintiff knew the defect complained of, or that he ought to have known it,

[3] Valliant, J., in Curtis v. McNair, 173 Mo. 270, (1902). * * * "If the plaintiff's suffering was solely from a risk incident to the business, he cannot recover because it was a risk he assumed when he undertook the service, and this fact the defendant may show under his plea of general denial, because in so showing he disproves the allegation of negligence on his part. A special plea that plaintiff assumed such a risk is unnecessary." * * * And so in Evans Laundry Co. v. Crawford, 67 Neb. 153 (1903).

nor any suggestion that he knew, or ought to have known, of the danger arising therefrom. The trial court therefore properly refused to submit the issue to the jury. * * *

Judgment affirmed.

III. *By Way of Equitable Defense.*[1]

DORR v. MUNSELL.

Supreme Court of New York, 1816. 13 Johnson 430.

This was an action of debt on a bond in the penalty of 400 dollars, dated the 21st September, 1810. The defendant craved oyer, and set forth the condition of the bond, which was for the payment of three sums, each of 66 dollars and 67 cents, in

1 The English Common Law Procedure Act of 1854, made the following provision for equitable defenses: § 83 "It shall be lawful for the defendant or plaintiff in replevin in any cause in any of the superior courts in which if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds to plead the facts which entitle him to such relief by way of defence, and the said courts are hereby empowered to receive such defence by way of plea, provided that such plea shall begin with the words 'for defence on equitable grounds', or words to the like effect."

By the Act of March 3, 1915, Congress made the following provision on the subject: Jud. Code, § 274b. "That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

Somewhat similar statutes are found in a number of the common law states, e. g. Maine, Massachusetts and Maryland.

The only provision in the New York Code on the subject of equitable defences is that permitting the defendant to set up as many defences as he has whether formerly denominated legal or equitable, § 507, ante p. 470.

one, two, and three years from the date; and then pleaded, 1. *Non est factum.* 2. That the bond was fraudulently obtained by the plaintiff, by representing himself to be the original inventor and patentee of an improvement in a machine for shearing cloth, containing a new mode and principle of drawing and moving the cloth in the machine while in the operation of being sheared; and that the same had not been invented by, or patented to, any other person, previous to the date of the letters patent granted to the plaintiff by the president of the United States. The defendant then averred that the said mode of drawing cloth, while in the operation of being sheared, was patented on the 22d November, 1805, to one Kellogg, and to one Samuel G. Dorr, on the 29th October, 1792; and that the defendant was not the original inventor and patentee thereof. That the defendant, in confidence of the representations of the plaintiff, made the bond in the declaration mentioned, and received therefor, from the plaintiff, a conveyance of his right to make and use the said machine for 14 years, in the county of Cayuga, and the township of Marcellus, in the county of Onondaga, excepting the town of Aurelius, in the county of Cayuga. 3. Generally that the bond was obtained by fraud.

To the second plea the plaintiff demurred, and assigned special causes of demurrer, which it is unnecessary to state, as the opinion of the Court was founded on the insufficiency of the plea in substance; and, to the third plea, he replied tendering an issue thereon. The case was submitted to the Court without argument.

Spencer, J., delivered the opinion of the Court. The plea demurred to is bad. It sets up a fraudulent representation of the plaintiff's patent right; and, in substance, it is a denial of any consideration for the bond. At law, the defendant cannot avoid a solemn deed on the ground of a want of consideration. That inquiry is precluded by the very nature of the instrument. The case of Vroman v. Phelps, (2 Johns. Rep. 177) is directly in point, that a fraudulent representation of the quality and value of the thing sold forms no defense in a suit on a specialty.

In some of the elementary writers, it is stated that fraud may be given in evidence under the plea of *non est factum.* This must be confined to cases where the fraud relates to the execution of the instrument, as if a deed be fraudulently misread, and is executed under that imposition; or where there is a

fraudulent substitution of one deed for another, and the party's signature is obtained to a deed which he did not intend to execute.[2] * * *

Judgment for plaintiff.

FORD v. DOUGLAS.

Supreme Court of United States, 1846. 5 Howard 143.

MR. JUSTICE NELSON delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States, held in and for the Eastern District of the State of Louisiana.

The complainants below, the appellees here, filed their bill against Christopher Ford, the appellant, and Robertson, the marshal of the district, for the purpose of obtaining injunctions to stay proceedings upon the several judgments and executions, which Ford had recovered in the Circuit Court of the United States against one Stephen Douglas, as executor of J. S. Douglas, deceased.

The judgments amounted to some $18,000, and the marshal had levied upon two plantations, and the slaves thereon, of which the testator, J. S. Douglas, had died seized and possessed.

The bill set forth that Stephen Douglas, against whom the judgments had been recovered, neither in his own right nor as executor of J. S. Douglas, deceased, had any title to or interest in the plantations and slaves which had been seized under and by virtue of the said executions; and that the same formed no part or portion of the succession in the hands of said executors to be administered. But that the whole of the said plantation and slaves, including the crops of cotton and all other things thereon, were the true and lawful property of the complainants; that they were in the lawful possession of the same, and had been for a long time before the issuing of the executions and seizure complained of; and had acquired the said property, and the title thereto, at a probate sale of all the property belonging to the

[2] For an interesting discussion of this problem, see "Fraud as a Defense at law in the Federal Courts," by Edwin H. Abbott, Jr., 15 Columbia Law Review, 489.

estate and succession of the said testator—which sale was lawfully made, and vested in the complainants a good and valid title. All which would appear by the *process verbal* of the said adjudications, and the mortuary proceedings annexed to and forming a part of the bill.

An injunction was granted, in pursuance of the prayer of the bill, staying all proceedings on the judgments rendered in the three several suits, and also on the executions issued thereon against the property.

Christopher Ford, the adjudged creditor, in answer to the bill, denied the validity of the probate sales of the plantations and slaves to the complainants, and charged that they were effected, and the pretended title thereto acquired by fraud and covin between the executor, Stephen Douglas, and the executrix, the widow of the testator, and one of the complainants, for the purpose of hindering and defrauding the creditors of the estate; that in furtherance of this design, a large amount of simulated and fraudulent claims of the executor and executrix were presented against the succession, to-wit, $53,000 and upwards, in favor of the former, and $76,000 and upwards in favor of the latter, which were received and allowed by the Probate Court, without any vouchers or legal evidence of the genuineness of the debts against the estate; and these simulated and fraudulent claims were made the foundation of an application to the said Probate Court for an order to sell the two plantations, and slaves thereon, under which the widow and Archibald Douglas became the purchasers at the probate sale; that neither had paid any part of the purchase money to the executor or Probate Court; and which was the only title of the complainants to the property in question, upon which the defendant had caused the executions to be levied.

In confirmation of the fraud thus alleged in the probate sales in the parish of Madison and the State of Louisiana, the defendant further charges that the testator died seized and possessed, also, of a large plantation, and slaves and personal property therein situate in the County of Clairborne and State of Mississippi, inventoried at upwards of $70,000, besides notes and accounts to the amount of $161,000 and upwards; that the said plantations and slaves were, on application of Stephen Douglas, the executor, to the Probate Court in that state, and an order for that purpose obtained, sold and purchased in by the widow

and executrix for about the sum of $40,000, and that the personal estate of $161,000 and upwards, of notes and accounts, were not, and have not been, accounted for by the executor to the Court of Probate.

In short, according to the answer of the defendant, the estate and succession of the deceased debtor, inventoried at about the sum of $300,000, and for aught that appears available to that amount, has been sold and transferred through the instrumentality and agency of family connections, under color of proceedings apparently in due form in the Probate Court, into the hands of the widow and a brother of the deceased, without adequate consideration, if consideration at all, and with intent to hinder delay and defraud the creditors of the estate, and particularly the defendant.

The complainants excepted to the answer filed by the defendant, because the matter and doings set forth therein could not in law be inquired into in the present suit, or proceedings instituted by the said complainants, and prayed that they might have the benefit of their injunction, and that it might be made perpetual.

And thereupon it was agreed that the case might be set down for argument on the matters of law arising on the bill and answer; and that if the judgment of the court in matters of law should be for the defendant, the complainants might join issue on the fact, and testimony be taken in the usual manner.

The court, after argument of counsel, decreed that the exception of the complainants to the defendant's answer was well taken, and gave leave to answer over, which was declined; and, therefore, the court adjudged and decreed that the injunction theretofore awarded in the case should be made perpetual; and it was further adjudged and decreed that complainants recover the costs of suit, without prejudice to the right of the defendant to any action he might think proper.

The decision of the court below, and the view which we have taken of the case here, do not involve the question whether the matters set forth in the answer sufficiently established the fact that a fraud had been committed by the complainants against creditors, in the several sales and transfers of the property in question, through the instrumentality of the Probate Court, nor, as it respects the effect of the fraud, if established, upon the title derived under these sales. If the case depended upon the de-

cision of these questions, we entertain little doubt as to the judgment that should be given.

The ground of decision below and of the argument here is that the complainants were not bound to answer the allegations of fraud against their title, in the aspect in which the case was presented to the court; that a title derived under a public sale, in due form of law, by the probate judge, protected them in the full and peaceable possession and enjoyment of the property until the conveyance was vacated and set aside by a direct proceeding instituted for that purpose; and that this step, on the part of the judgment creditors, was essential, upon the established law of the state of Louisiana, before he could subject the property to the satisfaction of his judgment.

We have, accordingly, looked into the law of that state on this subject, and find the principle contended for well-settled and uniformly applied by its courts in cases like the present. The judgment creditor is not permitted to treat a conveyance from the defendant in the judgment made by authentic act, or in pursuance of a judicial sale of the succession by a probate judge, as null and void, and to seize and sell the property which has thus passed to the vendee. The law requires that he should bring an action to set the alienation aside, and succeed in the same, before he can levy his execution. And so firmly settled and fixed is this principle in the jurisprudence of Louisiana, as a rule of property, and as administered in the courts of that state, that even if the sale and conveyance by authentic act, or in pursuance of a judicial sale, are confessedly fraudulent and void, still no title passes to a purchaser under the judgment and execution, not a creditor of the vendor, so as to enable him to attack the conveyance, and obtain possession of the property. In effect the sale, if permitted to take place, is null and void, and passes no title. (Henry v. Hyde, 5 Martin [N. S.] 633; Yocum v. Bullitt, 6 Ibid. 234; Peet v. Morgan, 6 Ibid. 137; Childress v. Allen, 3 Louisiana 477; Brunet v. Duvergis, 5 Ibid. 124; Samory v. Hebrard et al. 17 Ibid. 558.)

The case of Yocum v. Bullitt et al., among many above referred to, is like the one before us.

The court there says: "The record shows that the slaves had been conveyed by the defendant in the execution by a sale under the private signature recorded in the office of the parish judge of St. Landry, where the sale was made. If the sale was fraud-

ulent it must be regularly set aside by a suit instituted for that purpose; that it was not less a sale and binding upon third parties until declared null in an action which the law gives (*Curia Phil. Revocatoria,* n. 2); that the possession of the vendee was a legal one, until avoided in due course of law." The court further remarked that "The same point had been determined at the preceding term, in which it had been held that a conveyance alleged to be fraudulent could not be tested by the seizure of the property or estate, belonging to the vendor, but an action must be brought to annul the conveyance."

The principle runs through all the cases in the books of reports in that state, and has its foundation in the Civil Code (art. 1965, 1973, 1984), and in the Code of Practice (Sec. 3, art. 298, 301, 604, 607), and in Stein v. Gibbons & Irby (16 Louisiana 103). And from the course of decision on the subject, it is to be regarded not merely as a rule of practice, or mode of proceeding in the enforcement of civil rights, which would not be binding upon this court, but as a rule of property that effects the title and estate of the vendee, and cannot, therefore, be dispensed with without disturbing one of the securities upon which the rights of property depend. It gives strength and stability to its possession and enjoyment, by forbidding the violation of either, except upon legal proceedings properly instituted for the purpose. Neither can be disturbed, except by judgment of law. For this purpose the appropriate action is given, providing for the secession of all contracts, as well as for revoking all judgments when founded in fraud of the rights of creditors.

In this court, a bill filed on the equity side is the appropriate remedy to set aside the conveyance. In the present case a cross-bill should have been filed, setting forth the matters contained in the answer of the defendant. The vendees would then have had an opportunity to answer the allegations of fraud charged in the bill, and, if denied, the parties could have gone to their proofs, and the case disposed of on its merits.

It is said that in some of the Western States an answer like the one in question would be regarded by the courts in the nature of a cross-bill, upon which to found proceedings for the purpose of setting aside the fraudulent conveyance. But the practice in this court is otherwise, and more in conformity with the established course of proceeding in a court of equity.

We are of opinion, therefore, that the appellant mistook his

rights in attempting to raise the question of fraud in the probate sales in his answer to the injunction bill; and that, instead thereof, he should have filed a cross-bill, and have thus instituted a direct proceeding for the purpose of setting aside the sales and subjecting the property to his judgments and executions; and that in this respect, and to this extent, the decree of the court below was correct.

But on looking into the decree, we are apprehensive that it has been carried further than the assertion of the principle which we are disposed to uphold, and which may seriously embarrass the appellant in the pursuit of a remedy that is yet clearly open to him. * * *

We shall, therefore, reverse the decree, and remit the proceedings to the court below, with directions that all further proceedings on the three judgments and executions be stayed, as it respects the property seized and in question, but that the appellant have liberty to file a cross-bill, and take such further proceedings thereon as he may be advised.

Decree reversed.

KIRK v. HAMILTON.

Supreme Court of United States, 1880. 102 U. S. 68.

Error to the Supreme Court of the District of Columbia.[3] This was an action of ejectment, brought December 21, 1872, by George E. Kirk, against Charles O. Hamilton and Catherine Hamilton, to recover parts of lots 7 and 9 in square 437 in the city of Washington. The defendants pleaded not guilty. A verdict was returned in their favor, and, a new trial having been refused, judgment was entered on the verdict. Kirk sued out this writ.

The plaintiff claimed title as original owner. The defendants claimed title under a trustee's sale made under a decree in

[3] The procedure in the District of Columbia was substantially on the common law basis.

a judgment creditor's action against Kirk and others. The facts sufficiently appear in the opinion.[4]

MR. JUSTICE HARLAN, after stating the case, delivered the opinion of the court.

It appears from the first bill of exceptions that, upon the trial of the cause, the plaintiff, to maintain the issue joined, gave evidence to the jury tending to prove title in himself to the land in dispute, as well as his actual possession of the premises under that title; that he had fully discharged the indebtedness secured by the two deeds of trust executed, one to Lenox and Naylor, and the other to Clarke and Smith; that Charles Stott, on the 14th of May, 1872, reconveyed to him all that portion of the premises which, on the 22nd of March, 1856, he had conveyed to Stott; that he had never made nor authorized any other conveyances than those just named. He also introduced a deed from Carrington, as the supposed trustee in the case of Moore & Co. v. Kirk, etc., at the same time, however, denying its validity, and avowing that it was introduced subject to his exceptions reserved, and to be thereafter presented, as to its sufficiency in law to prove title in the defendants or either of them. It was admitted by the court subject to these exceptions. The plaintiff further gave evidence to prove that defendants were in possession of the premises at the commencement of the action, and then rested.

The bill of exceptions then shows that defendants, to sustain their defense, and to prove title out of the plaintiff, offered to read in evidence the record of the equity suit of Moore & Co. v. Kirk, etc. Plaintiff insisted that the record of that suit was insufficient in law to maintain the issue on the defendant's behalf, or to show title in them, and asked the court to inform the jury that it should not then be admitted in evidence, except subject to his exceptions as to its sufficiency in law, or to be thereafter presented to the court pending the further trial of the cause. The record was so admitted. The defendants, further to maintain their defense, and to prove title in themselves, offered to introduce testimony tending to prove that, at the time of the purchase of the premises at the sale made by Carrington, trustee, in the suit of Moore & Co. v. Kirk, etc., the only improvement thereon was a two-story four-roomed brick house, and that,

[4] Statement condensed.

about the year 1868, the defendants erected an extensive building on the property, at a cost of some $4,000; that when they began such building, and for some time thereafter, the plaintiff Kirk resided upon the adjoining premises; that during all that time he well knew of said improvements, made no objection thereto, and asserted no claim to the property, except the west three feet thereof, adjoining his ground, and which he claimed as an alley, and, even as to such portion, he subsequently informed the witness he was mistaken; and, lastly, that the plaintiff, though residing in the city of Washington ever since about the year 1865, never, to defendant's knowledge, until the commencement of this action, asserted any claim to the premises in dispute.

At that stage of the trial the plaintiff interposed and asked the court to inform the jury that the testimony thus offered, in reference to the defendant's putting improvements on the premises, was inadmissible in law, and that such issue ought to be found for the plaintiff. The court ruled that the testimony was admissible, to which plaintiff excepted. The defendants then gave the said testimony in evidence to the jury, who rendered a verdict against the plaintiff upon the issue set forth by the first bill of exceptions.

The remaining bills of exceptions present, in different forms, the general questions whether the sale by Carrington, as trustee, on the 19th of April, 1864, was or was not, upon the face of the record of Moore & Co. v. Kirk, etc., a mere nullity. Its validity is assailed by the plaintiff on various grounds, the most important of which seems to be: 1. That as Moore & Co. sued in their own behalf only, and not for the benefit of themselves and other creditors, the jurisdiction and power of the court was exhausted by the first sale (of lot No. 78), which raised an amount largely in excess of the claims for which Moore & Co. sued. 2. That the utmost which the court, upon the pleadings, could do was to distribute such excess among the other creditors of Kirk who should appear, in proper form, and establish their claims. 3. That the court was entirely without jurisdiction to make a second order of sale, and did not assume to exercise any such power. 4. That the second sale by Carrington, having been made without any previous order or direction of the court, its confirmation, and the deed subsequently made to Hamilton, were absolutely null and void.

In the view we take of the case, it is unnecessary to pass upon these several objections. If it be assumed that the record of the suit of Moore & Co. v. Kirk, etc., was of itself insufficient in law to divest Kirk of title to the premises in dispute, or to invest Hamilton with title, the question still remains, whether the facts disclosed by the first bill of exceptions do not constitute a defense to the present action.

After the confirmation of the sale of April 19, 1864, before any deed had been made, and while the cause was upon reference for a statement, as well as of the trustee's accounts as for distribution of the fund realized by the sales, Kirk, it seems, appeared before the auditor, by an attorney, and made objection to the allowance of the simple-contract debts which had been proven against him in his absence. So far as the record discloses, no other objection to the proceedings was interposed by him. Undoubtedly he then knew, he must be conclusively presumed to have known, after he appeared before the auditor, all that had taken place in that suit during his absence from the District, including the sale of the premises in dispute, which took place only a few months prior to his appearance before the auditor. If that sale was a nullity, the court, upon application by Kirk, after his appearance before the auditor, could have disregarded all that had been done subsequently to the first sale, discharged Hamilton's bond, returned the money he had paid, and, in addition, placed Kirk in the actual possession of the property. No such application was made. No such claim asserted. No effort was made by him to prevent the execution of a deed to the purchaser at the second sale. So far as the record shows, he seemed to have acquiesced in what has been done in his absence. In 1868, three years after his return to the city, and two years after Hamilton had secured a deed in pursuance of his purchase, he became aware that Hamilton was in actual possession of the premises, claiming and improving them as his property. He personally knew of Hamilton's expenditures of money in their improvement, and remained silent as to any claim of his own. Indeed, his assertion while the improvements were being made, of claim to only three feet of ground next to the adjoining lot upon which he resided, was, in effect, a disclaimer that he had, or would assert, a claim to the remainder of the lots 7 and 9 which Hamilton had purchased at the sale in April, 1864. And his subsequent declaration that

he was in error in claiming even that three feet of ground only added force to his former disclaimer of title in the premises. Hamilton was in possession under an apparent title acquired, as we must assume from the records, in entire good faith, by what he supposed to be a valid judicial sale, under the sanction of a court of general jurisdiction.

The only serious question on this branch of the case is whether, consistently with the authorities, the defense is available to Hamilton in this action of ejectment to recover possession of the property. We are of opinion that the present case comes within the reasons upon which rest the established exceptions to the general rule that title to land cannot be extinguished or transferred by acts *in pais* or by oral declarations. "What I induce my neighbor to regard as true is the truth as between us, if he has been misled by my asseveration," became a settled rule of property at a very early period in courts of equity. The same principle is thus stated by Chancellor Kent in Wendell v. Van Rensselaer, 1 Johns. (N. Y.) Ch. 344: "There is no principle better established, in this court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man, knowingly, though he does it passively, by looking on, suffers another to purchase, and expend money on land, under an erroneous opinion of title, without making known his own claim, shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel." p. 354.

While this doctrine originated in courts of equity, it has been applied in cases arising in courts of law.[5]

In The King v. The Inhabitants of Butterton (6 Durnf. & E. 554), Mr. Justice Lawrence said: "I remember a case some years ago in which Lord Mansfield would not suffer a man to re-

[5] Gaston, J., in Jones v. Sasser, 1 Dev. & Batt. (Law,) 452, (1836): "So far as equitable estoppels have been definitely recognized as rules of law, this court will unhesitatingly and cheerfully respect them. But it can not but apprehend that they have sometimes been incautiously admitted in courts of law from a solicitude to advance the justice of a particular case, although from the nature of their jurisdiction, and the inflexible forms of proceeding, these courts were not competent to the exact administration of equity. Thus it has happened that legal certainty has been prejudiced without the corresponding advantage of effecting complete justice."

cover, even in ejectment, where he had stood by and seen the defendant build on his land."

In 2 Smith, Lead. Cas., pp. 730-740 (7th Am. ed., with notes by Hare and Wallace), the authorities are carefully examined. It is there said that there has been an increasing disposition to apply the doctrine of equitable estoppel in courts of law. Again (pp. 733-734): "The question presented in these and other cases, which involve the operation of equitable estoppels on real estate, is both difficult and important. It is undoubtedly true that the title to land cannot be bound by an oral agreement, or passed by matter *in pais*, without an apparent violation of those provisions of the Statute of Frauds which require a writing when the realty is involved. But it is equally well settled that equity will not allow the statute to be used as a means of effecting the fraud which it was designed to prevent, and will withdraw every case not within its spirit from the rigor of its letter, if it be possible to do so without violating the general policy of the act, and giving rise to the uncertainty which it was meant to obviate. It is well established that an estate in land may be virtually transferred from one man to another without a writing, by a verbal sale accompanied by actual possession, or by the failure of the owner to give notice of his title to the purchaser under circumstances where the omission operates as a fraud; and, although the title does not pass under these circumstances, a conveyance will be decreed by a court of equity. It would, therefore, seem too late to contend that the title to real estate cannot be passed by matter *in pais*, without disregarding the Statute of Frauds; and the only room for dispute is as to the forum in which relief must be sought. The remedy in such cases lay originally in an application to chancery, and no redress could be had in a merely legal tribunal, except under rare and exceptional circumstances. But the common law has been enlarged and enriched under the principles and maxims of equity, which are constantly applied at the present day in this country, and even in England, for the relief of grantees, the protection of mortgagors, and the benefit of purchasers, by a wise adaptation of ancient forms to the more liberal spirit of modern times. The doctrine of equitable estoppel is, as its name indicates, chiefly, if not wholly, derived from courts of equity, and as these courts apply it to any species of property, there would seem no reason why its application should be restricted in courts

of law. Protection against fraud is equally necessary, whatever may be the nature of the interest at stake; and there is nothing in the nature of real estate to exclude those wise and salutary principles, which are now adopted without scruple in both jurisdictions, in the case of personalty. And whatever may be the wisdom of the change through which the law has encroached on the jurisdiction of chancery, it has now gone too far to be confined within any limits short of the whole field of jurisprudence. This view is maintained by the main current of decisions."

This question in a different form was examined in Dickerson v. Colgrove, 100 U. S. 578. This was an action of ejectment, and the defense, based upon equitable estoppel, was adjudged to be sufficient. We there held that the action involved both the right of possession and the right of property, and that as the facts developed showed that the plaintiff was not in equity and conscience entitled to disturb the possession of the defendants, there was no reason why the latter might not, under the circumstances disclosed, rely upon the doctrine of equitable estoppel to protect their possession.

Applying these principles to the case in hand, it is clear, upon the fact recited in the first bill of exceptions, and which the jury found to have been established, that the plaintiff is estopped from disturbing the possession of the defendants. He knew, as we have seen, that the defendants claimed the property under a sale made in an equity suit to which he was an original party. The sale may have been a nullity, and it may be that he could have repudiated it as a valid transfer of his right of property. Instead of pursuing that course, he, with a knowledge of all the facts, appeared before the auditor and disputed the right of certain creditors to be paid out of the fund which had been raised by the sale of this property. He forbore to raise any question whatever as to the validity of the sale, and by his conduct indicated his purpose not to make any issue in reference to the proceedings in the equity suit. Knowing that the defendant's claim to the premises rested upon that sale, he remained silent while the latter expended large sums in their improvement, and, in effect, disclaimed title in himself. He was silent when good faith required him to put the purchaser on guard. He should not now be heard to say that that is not true which his conduct un-

mistakably declared was true and upon the faith of which others acted.

The evidence upon this point was properly admitted, and operated to defeat the action independently of the question whether the sale by Carrington, the trustee, and its confirmation by the court, was, itself, a valid, binding transfer of the title to the purchaser.[6]

What has been said renders it unnecessary to consider the questions of law presented in the remaining bills of exceptions.

Judgment affirmed.

BECK v. BECK.

Court of Chancery of New Jersey, 1887. 43 N. J. Eq. 39.

VAN FLEET, V. C.: This is a suit by a wife against her husband to compel him to account for the rents of certain real estate which she says he has collected as her agent. The parties were married in August, 1854. The complainant holds the legal title to the two pieces of real estate in the city of Newark. The first was conveyed to her in August, 1859, and is situate on Springfield avenue. The second was conveyed to her in November,

[6] For a collection of the cases involving equitable estoppel as a defence to a legal title, see Kenny v. McKenzie, 127 N. W. 597 (1909), 49 L. R. A. (N. S.) 775, annotated.

It should not be assumed that corresponding changes have taken place in all other situations where a court of equity would protect a defendant against a legal claim. In the absence of statute the development has not been uniform.

Mr. Justice Swayne, in George v. Tate, 102 U. S. 564, (1880): * * * "Proof of fraudulent representations by Myers & Green, beyond the recitals in the bond, to induce its execution by the plaintiff in error, was properly rejected.

It is well settled that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give. Hartshorn et al. v. Day, 19 Howard 211; Osterhout v. Shoemaker and Others, 3 Hill (N. Y.), 513; Belden v. Davis, 2 Hall (N. Y.), 433; Franchot v. Leach, 5 Cow. (N. Y.), 506. The remedy is by a direct proceeding to avoid the instrument. Irving v. Humphrey, 1 Hopk. (N. Y.) 284." * * *

And so in Whitcomb v. Shultz, 223 Fed. 268, (1915).

1877, and is situate on the corner of New and Plane streets. There are buildings on both tracts, which have been almost constantly occupied by tenants since the complainant obtained title. The defendant has collected all the rents, but has neither paid nor accounted to the complainant for them. The complainant, by her bill, says that she authorized the defendant to collect the rents, with the understanding that he should apply them to the payment of taxes and other necessary annual charges of the premises, and also in making such improvements on the premises as would inure to her benefit and account to her from time to time for any balance which remained in his hands. The complainant revoked the defendant's agency in October, 1886, but he, notwithstanding, persisted in attempting to collect the rents, and because some of the tenants refused to pay rent to him he instituted legal proceedings to dispossess them. The complainant then brought this suit, asking that the defendant might be required to account for the rents he had already received, and also that he be restrained from making further collections, and from molesting or annoying her tenants. The defendant has answered, denying the complainant's right to an account. He says that he is the real owner of both tracts. His claim in this regard is put upon the ground of a resulting trust. He says that he made the contract of purchase for each tract, and subsequently paid the whole of the purchase money with his own funds, his wife not contributing a penny. He likewise says that he caused the legal title to the lands to be made to his wife, but that he did so without either an agreement or purpose to make a gift to her, or a settlement upon her, and that the lands have always, since she obtained title, been treated and considered as belonging to him, she holding the legal title in trust for him. The defendant puts his right to the rents of the property on the corner of New and Plane streets on an additional ground. He says that property was sold by the city of Newark, to enforce an unpaid assessment made against it, for a term of 50 years from the 16th day of March, 1871, and that a legal title was subsequently made to the purchaser in execution of the sale, and that he (defendant) became invested with such title on the 15th of July, 1878, and thereby acquired a right to the possession and use of this part of the property in controversy superior to any which the complainant can claim. The defendant has also made these facts the basis of a cross-bill, in which he asks a

decree declaring that the complainant holds the legal title to the lands in question in trust for him, and directing her to convey them to him.

This cross-bill is the subject of the present controversy. The complainant moves to strike it out both on the ground that it is useless and impertinent; useless, because, as her counsel contends, if the facts stated in the cross-bill were set up in the answer alone, and proved, they would constitute, under the answer, as complete and perfect a defense to the case made by the bill as can be made; impertinent, because the cross-bill seeks to thrust into the case a question entirely foreign to the matter put in litigation by the original bill.

There can be no doubt, I think, that a cross-bill which merely sets up matter which the defendant may make equally available and effectual as a defense by answer, is demurrable; for in such case the cross-bill is not only unnecessary, but useless. The only purpose it could serve in such case would be to incumber the record, and add to the expense of litigation. And it is also well settled that a defendant can only use a cross-bill against a complainant as a means of defense. It must, therefore, be confined to the matter put in litigation by the original bill, and cannot be used by a defendant as a means of obtaining relief against a complainant in respect to a cause of action distinct from and wholly unconnected with the complainant's cause of action. Carpenter v. Gray, 37 N. J. Eq. 389; Kirkpatrick v. Corning, 39 N. J. Eq. 136; Krueger v. Ferry, 41 N. J. Eq. 432 (5 Atl. Rep. 452). The question presented for judgment must be decided by these rules.

So far as the defendant's defense rests on a legal title, it would seem to be entirely clear that he does not need the aid of a cross-bill, but that he may make it fully and effectually under his answer. The *gravamen* of the complainant's case is that the defendant has, as her agent, received the rents of certain real estate which she holds for her own use, and refused to pay them to her. The defendant denies the principal fact upon which this claim rests. He says that the complainant does not hold the legal title to a part of the real estate of which she claims the rent, but that he does. If he establishes this fact, he will show as perfect and as complete a defense as can be shown, and a decree of dismissal denying that the complainant is entitled to these rents will render his defense, both in point of protection and prevention, as adequate and efficacious as can be.

The other branch of the defense stands, however, in a very different position, and is subject to entirely different rules. The deeds under which the complainant claims the rents in controversy show on their face that she is the absolute owner, for her own use, of the lands from which the rents were derived. So long as the deeds stand in their original form, the complainant's title to the rents must be regarded as perfect. The defendant seeks to change the form of the deeds, or at least their effect. They are now absolute, investing the complainant with a perfect legal title to the lands for her own use. The defendant seeks to fasten a trust upon the complainant's title. This can only be done by the decree of this court, and until this court has declared, by its decree, that the complainant's title is subject to a trust, the deeds must be construed and enforced, here and elsewhere, according to their plain terms. No such decree can be made except upon a bill, either original or cross. Parol evidence is admissible for the purpose of establishing a resulting trust, but not for the purpose of contradicting the terms of a valid written contract. If evidence of this kind should be offered and received in this case, under an answer alone, the only office it could perform would be to contradict the terms of the deeds; for, in this condition of the pleadings, the court would be powerless, even if such should be shown to be the fact, to fasten a trust on the complainant's title. So that the only purpose the admission of such evidence could serve, if the cross-bill is suppressed, would be to contradict the terms of the deeds. But with the cross-bill constituting part of the record in the case, such evidence could be properly received, not for the purposes of contradiction, but to lay the foundation for effecting a change, by judicial means, in the complainant's title—by making her title, which is now free and unclogged, subject to a trust. The case must, in my judgment, be ruled by the principles which govern the reformation of written contracts. In the absence of fraud, a defendant cannot show, under an answer alone, that a contract which is perfect and complete in all its parts differs, in a material respect, from the contract which he made; but if he desires to show that such is the fact, he must ask by cross-bill to have the contract reformed.[7] Van Syckel v.

Dalrymple, 32 N. J. Eq. 233, S. C. on appeal, Id. 826. * * *
The complainant's motion must, therefore, be denied.

CRARY v. GOODMAN.

Court of Appeals of New York, 1855. 12 N. Y. 266.

Action to recover possession of a parcel of land situate in Cattaraugus county, commenced in December, 1848. The cause was tried in January, 1850, before Mr. Justice Hoyt. The plaintiff proved that he had the legal title to the premises in controversy. The defendant proved that he occupied the premises as tenant under one Huntley, and that they were adjacent to other lands owned by the latter, and he alleged in his answer, and offered to prove upon the trial, facts tending to show that the land in dispute was included in the purchase, by Huntley, of the adjacent premises from the plaintiff's grantors, and that by a mutual mistake of the parties, it was not included in the conveyance thereof; and that in equity Huntley[8] was entitled, as

[7] It is entirely conceivable that courts of equity might have refused relief to a complainant whose title was obtained by fraud, or was held on a constructive or resulting trust for the defendant, and so have recognized such matters as defences. But they were probably influenced against such an innovation because of the practical inconvenience of attempting to deal with fraud, mistake, resulting trusts, etc., on the basis of a defence merely, whereby the complainant would have been deprived of the benefit of an answer, which he would have had to a cross bill. Ed.

[8] Morton, District Judge: In Breitung v. Packard, 260 Fed. 895, (1919): The gist of the alleged equitable defense is that the plaintiffs agreed with a third person to buy from it certain stock at a price more than sufficient to pay the entire issue of the notes in suit, and that the third person agreed with the defendants to apply the proceeds of said sale to the payment of the notes. The questions are: (1) Whether such facts constitute in equity a defense; and if so (2) whether the defense can be set up by equitable answer in an action at law, under the Act of March 3, 1915, c. 90 (38 Stat. 956 [U. S. Comp. St. 1918, § 1251b]).

Discussing the second of these questions, it is obvious that the third person is a necessary party to such a defense, and that the defense ought not to be allowed unless the third party can be brought into the case. The ordinary practice in actions at law affords no way of doing so. It can-

against the plaintiff, and his grantors, to a conveyance of the premises, the possession of which was in controversy. To this evidence, the counsel for the plaintiff objected; and the justice decided that no equitable defense could be interposed in this action to the plaintiff's right to recover upon the legal title, and rejected the evidence; the counsel for the defendant excepted. A verdict was rendered in favor of the plaintiff. From the judgment entered on this verdict, the defendant appealed. The case was heard on the appeal at a general term of the supreme court in the 8th district, and the judgment affirmed. (See 9 Barbour 657.)[9] The defendant appealed to this court. The case was submitted on printed briefs.

not be done under the act unless the answer be given the effect of a bill in equity to restrain the action at law. There is a dictum in U. S. v. Richardson, 223 Fed. 1010, 1013, 139 C. C. A. 386—a jury-waived case—which perhaps sustains that view. But the point has never been decided, and the practical difficulties which such a construction of the act would create in jury trials are so great and apparent, that it seems to me unlikely Congress could have so intended. Bills setting up equitable defenses are often complicated, involving many parties, and raising many questions. A jury trial is not a flexible proceeding, nor well adapted to the determination of complicated and confused issues. If the act be given the broad construction suggested, cases can easily be imagined which it would be impossible to try properly before a jury.

Massachusetts has had a statute allowing equitable defenses in actions at law since 1883. Rev. Laws Mass. c. 173, § 28. The point under discussion seems not to have been raised under it; but I have found no decision in which a third party was brought into an action at law by an equitable answer. It seems to have been assumed that the statute only applied to such defenses as could be adequately made between the two parties to the original action. That seems to me to be the sound construction of the act in question.

It follows that, as this answer discloses the necessity of a third party in order to establish the defense which it sets up, it is not good under the act; and the demurrer to it should be sustained.

[9] Sill, P. J. (in Crary v. Goodman, 9 Barbour 657): "It follows that an equitable right in a defendant, to have land conveyed to him, is not a defense to an action for the possession, any more than it was before the Code was adopted. The right to the possession is incidental to the legal title; or rather it is one essential ingredient of it. Where is the reason for saying that the sixty-ninth section of the code has detached the essential interest from the legal estate and appended it to an equitable interest merely? The argument comes to this, and to maintain the defense, it must be held that the code has transferred the right to the possession of land

JOHNSON, J., delivered the opinion of the court:

The principal ground on which this case was disposed of at the trial was, that in an action to recover real property brought under the Code of 1848, when the plaintiff's claim is founded upon a legal title, the defendant cannot avail himself of an equitable right to defeat that title by way of defense in the suit. This, likewise, was the single ground upon which the judgment at the trial was affirmed at the general term. (9 Barb. 657.) Although much difference of opinion has existed in the different courts of this state in regard to the effect of the Code of Procedure in this particular, the question has been adjudged in this court (Dobson v. Pearce, *ante,* 156); and it is now neither necessary nor proper to discuss it. In the case cited, which was an action upon a judgment, the Superior Court of the City of New York allowed, as a defense to the action, facts which made out a right in the defendant to relief upon equitable grounds against the judgment, but which confessedly would not have been available as a defense to the action at law before the Code. The case arose and was tried in the superior court, before the amendments to the Code passed in 1852; one of which provides, in express terms, that the defendant may set up as many defenses as he has, whether they are such as have been theretofore denominated legal, or equitable, or both. This judgment was affirmed in this court upon the ground that since the enactment of the Code, which in terms abolishes the distinction between actions at law and suits in equity, and prescribes but a single form of civil action, the question in an action is not whether the plaintiff has a legal right or an equitable right, or the defendant

from the legal owner to him who has an equitable claim to the title. Such an interpretation would produce the consequences which the commissioners said it was their duty to guard against. It would, by construction, "encroach upon substantial rights," which both the common law and pre-existing statutes concurred in securing to him who holds the legal title. It seems to me that the defendant's argument, when followed out, destroys itself. The facts offered to be proved by him, are claimed to constitute an equitable defence to the action. But to give it efficacy, it is necessary to insist that the equitable owner has the right to possession, as between him and the owner in fee. If this were so, the defence would be a legal one. The action is for the possession, and he who is entitled to the possession is, by the common law, entitled to judgment. Thus the case is placed without the operation of the section, the application of which is indispensable, as a starting point in the argument."

a legal or an equitable defense against the plaintiff's claim; but whether, according to the whole law of the land, applicable to the case, the plaintiff makes out the right which he seeks to establish, or the defendant shows that the plaintiff ought not to have the relief sought for.[10]

As the court, upon the defendant's offers of proof, ruled that no equitable defense could be interposed, and in this was, as we have seen, in error, the defendant is entitled to a new trial. We express no opinion whether the defendant did, or did not make out by his offers such an equitable defense, because, if his offer was defective, under the distinct ruling of the court, no alteration in its terms or substance would have availed him. The judgment should be reversed and a new trial ordered.

Judgment accordingly.

WARD v. QUINLIVIN.

Supreme Court of Missouri, 1874. 57 Mo. 425.

ADAMS, JUDGE.—This was an action on a judgment rendered in the State of New York, in Supreme Court of Steuben County in that State, on the 17th day of October, 1871, for $586.50.

The defendant in his answer set up and relied on an equitable defense, to the effect that the judgment sued on was obtained against him by fraud, deceit and misrepresentation of plaintiff, his agents and attorneys, under the following circumstances: About April, 1870, the defendant was in the store room of plaintiff, in the town of Bixville, in the county of Steuben, in the State of New York, when plaintiff proposed selling to him a piece of land at $18.00 per acre, and in order

[10] See also Hoppaugh v. Struble, 60 N. Y. 430, (1875), in which it was said, in dealing with the defence that the land sued for had been omitted by mistake from plaintiff's deed to the defendant: "But a reformation of the deed was not necessary to the defence of the action. The same state of facts which would entitle the defendant to a reformation of the deed would establish his equitable right to the possession and would as effectually defeat the action as would legal title." Compare Imperial Shale Co. v. Jewett, 169 N. Y. 143, (1901), ante p. 35.

to defraud defendant, fraudulently induced him to drink a large quantity of whiskey, and thus made him so drunk that he did not know what he was doing, and procured his signature to the bond on which said judgment was rendered.

The defendant alleges, that he set up this defense to the action in the New York court, and attended court for the purpose of establishing his defense, that the plaintiff and his attorneys, with a view to cheat and defraud him, and to obtain an unfair advantage over him, falsely and fraudulently represented to defendant and his attorneys, that they would dismiss their suit —that plaintiff had no cause of action, and would dismiss the pending suit, and that defendant and his attorney might go home and give the matter no further attention; that relying upon their statements and representations, the defendant and his attorney, abandoned all further defense, and went to their homes, and soon afterwards the defendant removed from the State of New York to the State of Missouri. And defendant charges that after he had thus removed to the State of Missouri, the plaintiff took judgment in the action.

The court below ruled out this defense, and the action of the court in this regard raises the only question for our consideration.

The doctrine that a judgment of a court of record of a sister State,[1] where the parties appear, or are duly summoned, imports absolute verity, and cannot be impeached at law, is too well settled to need illustration or citation of authorities. But, conceding this principle to be true, it is clear to my mind, that in equity, judgments, whether foreign or domestic, may be declared void for fraud, in actions brought to enforce them in this State.

In Christmas v. Russell (5 Wal. 290) the court held that a plea of fraud in obtaining a judgment, was had in an action on the judgment. But that court, in the same case, held that a direct suit in chancery[2] might be maintained to enjoin such

1 A judgment of a court of record of another state creates a debt of record, and must be so recognized in other states under the "full faith and credit" clause of the Constitution of the United States, Andrews v. Montgomery, 19 Johnson, 162, (N. Y. 1821).

2 In Dobson v. Pearce, 12 N. Y. 156, (1854) a judgment at law had been recovered against the defendant in the State of New York, and a suit brought upon it in the State of Connecticut, where he began an

judgment in the State where it was rendered. Our practice act allows equitable as well as legal defenses to be set up in actions at law, and our citizens ought not to be driven to foreign courts to seek remedies against judgments procured by fraud. When

independent suit in chancery to restrain the action on the judgment because of fraud in the procurement, and obtained a permanent injunction. Later, when sued on the judgment in New York, defendant set up the fraud and the Connecticut decree as a defence, and this was allowed on the following reasoning, by Allen, J., * * *

"Under our present judiciary system, the functions of the courts of common law and of chancery are united in the same court, and the distinctions between actions at law and suits in equity, and the forms of all such actions and suits are abolished, and the defendant may set forth by answer as many defences as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. (Code §§ 69, 150.) The Code also authorizes affirmative relief to be given to a defendant in an action by the judgment. (§ 274.) The intent of the legislature is very clear, that all controversies respecting the subject matter of the litigation should be determined in one action, and the provisions are adapted to give effect to that intent. Whether therefore, fraud or imposition in the recovery of a judgment could heretofore have been alleged against it collaterally at law or not, it may now be set up as an equitable defence to defeat a recovery upon it. Under the head of equitable defences are included all matters which would before have authorized an application to the court of chancery for relief against a legal liability, but which, at law, could not have been pleaded in bar. The facts alleged by way of defence in this action would have been good cause for relief against the judgment in a court of chancery, and under our present system are, therefore, proper matters of defence; and there was no necessity or propriety for a resort to a separate action to vacate the judgment. In Connecticut, although law and equity are administered by the same judges, still the distinction between these systems is preserved, and justice is administered under the head of common law and chancery jurisdiction by distinct and appropriate forms of procedure; and hence, as it was at least doubtful whether at law the fraud alleged would bar a recovery upon the judgment, a resort to the chancery powers of the court of that state was proper, if not necessary. * * *

In the State of Connecticut it is quite clear the question of fraud would not be an open question between the parties, but would be considered entirely settled by the decree of the court of that state; and as full faith and credit are to be given by each state to the judicial proceedings of every other state, that is, the same credit, validity and effect as they would have in the state in which they were had, the parties are concluded in the courts of this state by the judgment of the court in Connecticut directly upon the question in issue. (Hampton v. McConnel, 3

sued here upon such judgments, they may set up this equitable defense as a complete bar.[3] (See Marx v. Fore, 51 Mo. 691.)

Judgment reversed and the cause remanded. Judge Sherwood absent, the other judges concur.

GUNN v. MADIGAN.

Supreme Court of Wisconsin, 1871. 28 Wis. 158.

LYON, J.[4]—The complaint alleges that James Francis and Henry Gormley, on the 9th day of April, 1867, made, executed, stamped and delivered to the defendant their promissory note in writing, a copy of which is inserted in the complaint. The note is dated April 9th, 1867, is for $201.66 and ten per cent. interest, and was payable October 1st, 1867.

The complaint further states that on the 9th day of October, 1867, the defendant, for value received, sold, transferred, assigned and delivered said note to the plaintiff, and then and there guaranteed the payment thereof to the plaintiff by his

Wheat. 234.) The decree of the court of chancery of the State of Connecticut as an operative decree, so far as it enjoined and restrained the parties, had and has no extra-territorial efficacy, as an injunction does not affect the courts of this state; but the judgment of the court upon the matters litigated is conclusive upon the parties everywhere, and in every forum where the same matters are drawn in question. It is not the particular relief which was granted which affects the parties litigating in the courts of this state; but it is the adjudication and determination of facts by that court, the final decision that judgment was procured by fraud, which is operative here and necessarily prevents the plaintiff from asserting any claim under it."

And so in Burnley v. Stevenson, 24 Ohio St. 474, (1893). At common law neither the fraud nor a domestic decree would have defeated an action at law on a specialty or a record, Anon. Jenkins Century Cases, 108, (1459), S. C. 37 H. VI, 13, translated by the late Professor Ames, Cases on Eq. Jur. 1.

[3] Acc. Rogers v. Grimes, 21 Ia. 58, (1866); Jasper v. Currie, 69 Neb. 4 (1903); S. C. 195 U. S. 144, reversing the Supreme Court of Nebraska on the ground that the facts stated did not amount to fraud. Gray v. Richmond, 167 N. Y. 348, (1901), semble; Levin v. Gladstien, 142 N. C. 482, (1906), 32 L. R. A. (N. S.) 905, annotated.

[4] Statement and part of opinion dealing with the sufficiency of the complaint omitted.

written guaranty, duly stamped, endorsed on the back of said note as follows:

"For value received, I guaranty the payment of the within note when due.

"Dated October 9th, 1867.

His
"John X Madigan."
mark.

It concludes as follows:

"And although said note became due and payable before the commencement of this action, yet the said makers of said note, nor the said defendant, have paid the same or any part thereof, except the interest to October 9th, 1867; that the plaintiff is now the owner and holder of said note and guaranty; and that there is now due on said note the sum of $201.66 with interest from October 9th, 1867, at ten per cent." Demand for judgment in the usual form.

The answer of the defendant denies the making of the guaranty in the form stated in the complaint, but admits the sale and delivery of the note to the plaintiff, and the signing, by making his mark, of a written guaranty endorsed thereon. It further states that at the time of such sale and transfer, the time for the payment of such note was extended by agreement between the plaintiff and the makers of the note, in consideration of the payment by them of the interest thereon to that date; that the agreement between the plaintiff and defendant was, that the defendant should guaranty the *collection* of the note; that when he signed the guaranty he supposed and intended the same to be a guaranty of the *collection* thereof pursuant to such agreement; and that "by mistake of Arie Banta, the person who wrote said guaranty, the word '*payment*' if written by him therein, was used instead of the word *collection*, contrary to said agreement and the intention of the parties thereto." The defendant denies the making of any other or different guaranty.

The answer does not state that any defense therein contained is set up by way of counterclaim,[5] and no demand is therein made for affirmative relief.

The complaint and answer are the only pleadings in the action.

[5] For the statutory definition of a counterclaim, see ante p. 470.

On the trial, the plaintiff, under objection by the defendant, which the court overruled, read in evidence the note and guaranty, and there rested his case. A motion by the defendant for judgment of nonsuit was overuled, and the defendant offered himself as a witness in his own behalf. The plaintiff objected to the admission of any evidence on the part of the defendant, under his answer, relating to the mistake therein alleged, and the court sustained the objection. The defendant offered no other evidence, and the court directed the jury to return a verdict for the plaintiff for the amount of the principal and interest due on the note, which was accordingly done.

A motion having been made to set aside such verdict and for a new trial, the court, during the same term at which such verdict was found, stayed all proceedings thereupon until the further order of the court, and ordered further "that the equitable issue formed by the answer of the defendant in said action be tried before this court at a general or special term, upon the usual notice." Afterwards at a special term of the court, the plaintiff having duly noticed such issue for trial, and the cause being upon the calendar, the defendant moved to strike it from the calendar, and objected to the trial thereof without a jury; but such motion was denied and such objection overruled by the court. The defendant thereupon declined to give any evidence relating to such alleged mistake or such equitable issue; and thereupon the court vacated the former order staying proceedings upon the verdict, and gave judgment upon such verdict for the plaintiff.

From that judgment the defendant has appealed to this court.

* * *

The next point made by the counsel for defendant is, that the answer contains a counterclaim, and that the defendant was entitled to judgment thereon for want of a reply, by virtue of the provisions of the code on that subject. R. S., ch. 125, sec. 31.

That the allegations of the answer in respect to the mistake in the contract of guaranty constitute the proper subject matter of a counterclaim, must be conceded, because those allegations constitute a distinct cause of action in favor of the defendant and against the plaintiff; and such cause of action is clearly available as a counterclaim in this action, if pleaded as such.

But the difficulty is that it is not so pleaded. There is nothing in the answer from which we can infer that it was intended to

interpose the defense as a counterclaim. The liberal rule for the construction of pleadings before mentioned would doubtless excuse the pleader from using any particular form of words in order to make his pleading a counterclaim; but he must by some reasonable language indicate that he so intends it. The usual form of giving such intimation is by inserting therein a prayer for relief, or a statement that the pleading is a counterclaim. We find nothing of the kind in this answer, and the law is well settled that in such case the pleading cannot be considered a counterclaim. McConihe v. Hollister, 19 Wis. 269; Bates v. Rosekrans, 37 N. Y. 409; Clough v. Murray, 19 Abb. Pr. R. 97; Wright v. Delafield, 25 N. Y. 266; Burrall v. De Groot, 5 Duer 379.

The allegations of the answer being stated merely as a defense and not as a counterclaim, no reply was necessary. R. S., Chap. 125, sec. 32.

The remaining question to be determined is, whether the court erred in excluding all evidence on the part of the defendant concerning the mistake set forth in the answer, from the consideration of the jury.

Beyond all question the answer in this respect states an equitable cause of action against the plaintiff. Had the defendant commenced an action[6] against the plaintiff, averring the same facts and demanding judgment that the contract of guaranty be reformed in accordance with the alleged contract between the parties, such action would have been an equitable one, and neither party would have been entitled to a jury trial as a matter of right. Clearly the nature of such cause of action is not changed, if, instead of bringing an action thereon, the defendant pleads the same facts as a defense to an action brought against him on the guaranty. These facts, being pleaded as a defense and not as a counterclaim, are deemed to be denied by the plaintiff, without a reply, and thus an issue is made upon them by operation of the statute. R. S. ch. 125, sec. 32. Such issue is necessarily an equitable one.

It is not a good answer to these views to say that the code abolished the distinction between actions at law and suits in

[6] An action for reformation may be barred by the statute of limitations, though the legal action on the instrument as written is not, Bradbury v. Higginson, 167 Cal. 553, (1914).

equity, and that therefore this defense stands on the same footing with any other defense in a civil action. For there are inherent differences between actions at law and suits in equity, which cannot be abolished, and which are constantly recognized by the legislature and the courts. Wiggins v. Silverthorn, 10 Wis. 492; Mowry v. Hill, 11 Wis. 146; Stillwell v. Kellogg, 14 Wis. 461; Truman v. McCollom, 20 Wis. 360.

The issue thus made by the answer, being an equitable one, was properly triable by the court, and there was no error in taking an assessment of damages by a jury before such issue was tried. Harrison v. The Juneau Bank, 17 Wis. 340. It is said in that case that the correct practice in such cases is to try the equitable issue first, and afterwards the legal issue. This is doubtless true as a general rule, but it not infrequently happens at the circuit that it becomes desirable to dispose of the legal issue first, in order to avoid delay, and for the convenience of the court. The order in which the issues are tried, may, I think, be left to the discretion of the circuit judge. In this case no defense was interposed except the alleged mistake. The answer substantially admits the signing of the guaranty, and it is doubtful whether an assessment of damages was necessary. The only way in which the defendant could have obtained any benefit under his answer, was to proceed to the trial of the equitable issue, and there establish by evidence the truth of its averments. Had he proved the mistake in the guaranty, as alleged, doubtless the court would have required the plaintiff to amend his complaint to correspond with the contract actually made by the parties, and, in default of making such amendment, would have dismissed his action.

Clearly it was not competent for the defendant to show this alleged mistake by oral testimony in any other way. The written guaranty is presumed to express the real contract between the parties; and in an action upon it, evidence to show that an agreement or understanding existed, at the time of its execution, which changes its terms or controls its legal effect, is inadmissible. Such evidence can only be received in a direct proceeding to reform the contract. These principles are elementary and of universal application, and it is quite unnecessary to cite authorities in support of them.

The circuit court treated the averments of the answer in that behalf as equivalent to a direct proceeding to reform the con-

tract of guaranty, and gave the defendant an opportunity, in strict accordance with the rules of law and the practice of the court, to try the issue and prove[7] his defense if he could. The defendant refused to avail himself of the opportunity thus given, and left his defense entirely unproved. Under these circumstances the court could do no less than give judgment for the plaintiff on the verdict.

We find no error in the proceedings and rulings in the circuit court, and are of the opinion that the judgment should be affirmed.[8]

Judgment affirmed.

LOMBARD v. COWHAM.

Supreme Court of Wisconsin, 1874. 34 Wis. 486.

This action below was brought by Lombard to recover the undivided one-half of an eighty acre lot situated in the county of Fond du Lac. The complaint is the usual form of complaints

[7] As to the amount of proof necessary to obtain a reformation in equity, see Phillipine Sugar Co. v. Phillipine Islands, 247 U. S. 385, (1915), in which it was also held that a cross-complaint for reformation under the Phillipine Code so far converted the case into one in equity as to make it reviewable on appeal instead of writ of error.

[8] See Born v. Schrenkeisen, 110 N. Y. 55, (1888), treating failure to set up mistake in the form of a counterclaim for reformation as a mere formal defect.

In Hauser v. Murray, 256 Mo. 58, (1913), an answer setting up an "equitable title", without any prayer for relief, was treated as amounting in substance to a counterclaim on which there was no right to a trial by jury. That mistake is not available as a defense under the equitable defense statute of the common law states see Martin v. Smith, 102 Me. 27, (1906); Nydegger v. Gitt, 125 Md. 572, (1915).

But see Schlosser v. Nicholson, 184 Ind. 283, (1916), allowing mistake as a defence on the following theory: "There can be no doubt that equity has power to reform and correct written instruments which thus embody a mistake of fact (Adams v. Wheeler (1890), 122 Ind. 251, 23 N. E. 760; Remm v. Landon (1909), 43 Ind. App. 91, 86 N. E. 973), and we see no reason why the existence of such a mistake may not properly be pleaded by way of estoppel to a complaint which seeks to take advantage thereof."

Compare earlier case of Conger v. Parker, 29 Ind. 380, (1868).

in actions of ejectment. The answer is, 1st, A general denial; 2nd, The statute of limitations; 3rd, An estoppel. The Circuit Court seems to have held that the special answers were defective, and that no testimony was admissible on behalf of the defendant, except such as was admissible under the general denial alone.

It appears that the land in controversy was purchased of the government, in 1847, by one Andrew Meritt, who died intestate and seized of such land, in 1855, leaving his two sisters, Polly A. Little and Betsey R. Clark, his sole heirs-at-law. The plaintiff claims title under a conveyance from Betsey R. Clark, executed in 1870; and the defendant claims title under a conveyance executed in 1856 by the administrator of the estate of Andrew Meritt to one Ackerson, and *mesne* conveyances from the latter to the defendant.

The estoppel pleaded, or attempted to be, is to the effect that the purchase money paid by Ackerson for the land was used to pay the debts of the intestate chargeable upon the estate, and, a surplus remaining after paying such debts, the same was distributed to the heirs; and that Mrs. Clark, with full knowledge of all the facts, received her portion of the surplus and retains the same; and further, that the plaintiff is chargeable with notice of the foregoing facts when he took a conveyance of the land from Mrs. Clark.

The court (under objection) admitted testimony tending to show that the plaintiff procured such conveyance by fraudulently representing to Mrs. Clark that he desired it for the benefit of the purchaser at the administrator's sale, and to cure certain defects in his title; and that she executed the same for a nominal consideration, and for the sole purpose of confirming and ratifying the title of such purchaser. These facts are not stated in the answer.

The following instruction was asked on behalf of the plaintiff, and refused: "In this action, under the pleadings, you cannot consider any equities of the defendant. The legal title must prevail over any equitable claim or title." The court instructed the jury as fallows: "There is in this action and upon this testimony but one question for your determination, and that is the question whether the deed under which the plaintiff claims from Betsey R. Clark, was fraudulently procured by the plaintiff or his agent. If it was procured by fraudulent representations that

the plaintiff or his agent was obtaining this deed for the benefit and for the purpose of supporting the title of the grantee in the administrator's deed and those holding under him, and you believe that to be true from the testimony in this case, that deed is void, the plaintiff has no title, and the defendant is entitled to your verdict."

The jury returned a verdict for the defendant; and judgment pursuant thereto was duly entered and perfected against the plaintiff; who brought the case to this court by writ of error. * * *

LYON, J. It seems to be conceded that the proceedings in the probate court preliminary to the sale and conveyance of the land in controversy, by the administrator of the estate of Meritt to the grantor of the defendant, are so defective and irregular that they will not support a conveyance, and hence, that the administrator's deed is void. If that deed is void, the legal title to an undivided half of the land was in Mrs. Clark until she conveyed to the plaintiff in 1870. The circuit court held that if the plaintiff or his agent procured the conveyance from Mrs. Clark by fraudulently representing to her that he desired it for the benefit of the grantee in the administrator's deed, or those claiming under such grantee, and if Mrs. Clark executed the conveyance with the intention, and for the purpose of ratifying and confirming the title of those holding under the administrator's deed, the conveyance to the plaintiff is void, and the title still remains in Mrs. Clark. We think that this is an error, and that at least the *legal* title passed to the plaintiff by virtue of such conveyance.

But, assuming that the plaintiff obtained his title by the fraudulent means just mentioned, is the defendant affected by that fact, and can he claim an equitable interest in the land in controversy by reason of the alleged fraud? We think this question has been determined by this court in the case of Onson v. Cown, 22 Wis. 329. That, also, was an action of ejectment. The defense was that the land in controversy was school land; that the defendant once held a certificate therefor from the state, which became forfeited for nonpayment of interest, and the land was resold to one Keyes; that Larson, the grantor of the plaintiff, applied to Keyes to purchase the land, and stated that he desired to do so for the benefit of the defendant; and that thereupon Keyes assigned his certificate to Larson, who paid for

the land and took a patent therefor from the state. There had been no previous arrangement between Larson and the defendant concerning the land. The answer contained a counter-claim, and demanded that the plaintiff be adjudged to convey the land to the defendant. This was held to be a good defense and counter-claim; and the facts therein stated having been proved, the plaintiff (who had notice of such facts when he took his conveyance) was compelled to convey the land, to which his grantor had thus fraudulently obtained title, to the defendant. There were some equities to be adjusted in that case which do not exist here. The principle applied in that case is thus stated in Perry on Trusts, § 172: "If a purchaser at auction or otherwise represents that he is purchasing or bidding for some other person, as for the debtor in a sale under an execution, or for the mortgagor in a sale under a foreclosure, or for the family under an executor's or administrator's sale, and competition is thus prevented, and the sale is made on his own terms, equity will decree that such person shall be a trustee for the person for whom he represented that he was acting."

It will be observed that conveyances thus obtained are not declared void, but are held to pass the legal estate to the grantee, but subject, in equity, to a trust in favor of him for whom the grantor professed to act, coextensive with his profession or representation in that behalf.

But it may be argued that it is quite immaterial in this case whether the conveyance to the plaintiff be held void, or whether it be held valid to pass the legal title, with a trust engrafted upon it in favor of the defendant, inasmuch as, in either case, the plaintiff must fail in his action; and hence that the judgment should not be reversed because the court erred in the instruction that the conveyance was void if obtained by means of fraudulent representations stated in the charge. A little reflection will satisfy the mind that the argument is unsound. The error is not immaterial. Were the conveyance to plaintiff void in the contingency mentioned, the question of the existence of such contingency would be one of fact for the jury to determine, and would doubtless be available to the defendant, as a defense, under the pleadings. To prove that the conveyance under which the plaintiff claims title is void, is merely one method of proving that the title to the land in controversy is in some third party.

This is strictly a legal defense, is admissible under the general denial, and, when proved, defeats the action.

But the conveyance being a valid one to pass the legal title to the plaintiff, the defense that it enures to the benefit of the defendant is purely an equitable defense in that, if established, it results in the declaration and enforcement of a trust, which is a matter cognzable in courts of equity alone. The issue upon such a defense, if affirmative relief is demanded by the defendant, is triable by the court, unless the court shall order the same to be tried by a jury, as it may order questions of fact to be so tried in other equity cases, in its discretion.[9] Tay. Stat. 1494,

[9] There is much confusion in the cases as to the proper mode of trial where an equitable defence is set up. In a number of cases it is asserted broadly that an equitable defence is to be tried by the court, while others appear to restrict that method to cases where the equitable matter is set up in the form of a counterclaim or cross-action. The following distinction was taken in Gill v. Pelkey, 54 Ohio St. 348, (1896):

"It may be quite true that an equitable defense merely, that is, one which sets forth some equitable considerations for the sole purpose of resisting the plaintiff's demands, without asking any affirmative action of the court whatever, will not affect the mode of trial, although it would have done so if the party had invoked some affirmative relief. The difference between them being that the first is simply a defense to the cause of action stated in the petition, while the other is a cross demand constituting a cause of action in itself, on which a separate action might have been maintained. The former being merely a defense, cannot draw to itself a mode of trial different from that prescribed for the cause of action to which it relates. The latter being a distinct cause of action, is of equal dignity with the one set forth in the petition, and therefore equally entitled to its appropriate method of trial.

This view of the matter will reconcile Smith v. Anderson, supra, with Massie v. Stradford, 17 Ohio St., 596; Taylor v. Leith, 26 Ohio St., 428; Buckner v. Mear, Ib., 514, and the later decisions of this court upon the subject. Sheeful v. Murty, 30 Ohio St. 50; Dodsworth v. Hopple, 33 Ohio St. 16; Rankin v. Hannan, Adm'r, 37 Ohio St. 113. In Buckner v. Mear and Dodsworth v. Hopple, the authority of Smith v. Anderson is expressly limited to instances where the answer sets forth an equitable defense merely without asking affirmative relief."

In Missouri the same distinction has been taken, that an equitable defense without a prayer for affirmative relief did not make the case reviewable as in equity, Kerstner v. Vorweg, 130 Mo. 196, (1895); but see Hauser v. Murray, 256 Mo. 58, (1913). In New York it appears to be fairly well settled that all of the issues are to be tried by jury, except where affirmative relief is necessary, Lowenthal v.

§ 6. But in such case the verdict does not have the same force and effect as verdicts in actions at law. It is not binding upon the judgment of the court, and if unsatisfactory and against the weight of the testimony, the court may set it aside and order a new trial of the issue, or may vacate the order awarding a jury trial, and decide the issue without intervention of a jury. Jackman's Appeal, 26 Wis. 104. That the court should retain this plenary control over verdicts in equity cases where jury trials are awarded, is a material and valuable right of the parties. Hence, an error which results in depriving the court of that power, must necessarily be a material error.

The counsel for the defendant, evidently perceiving the difficulty, argue in their brief that in cases of fraud, equity and law have concurrent jurisdiction. In some cases of fraud this is true, but it is not true as a general proposition. We apprehend that the learned counsel would be at a loss how to proceed, in order to procure in an action at law a declaration and enforcement of the trust which may result to their client by reason of the alleged fraud of the plaintiff in procuring his conveyance.

The defense, being an equitable one, to be available in an action of ejectment, must be set up in the answer, and be accompanied by a demand for such relief as the defendant supposes himself entitled to. Tay. Stat. 1667, § 7 (R. S., Ch. 141, sec. 7.) A mere equitable defense is not sufficient. There must be a counter-claim also. The statute was doubtless intended to avoid the difficulty suggested by Hand, J., in Dewey v. Hoag, 15 Barb. 365. He says: "I do not understand there is any equitable defense, simply as a defense, in an action of ejectment. The effect of that might be to keep the legal title and possession forever separate." (p. 369.)

The court erred, therefore, in admitting, under the pleadings, testimony tending to show that the plaintiff procured his conveyance by representing to Mrs. Clark, his grantor, that he desired it for the benefit of the purchaser at the administrator's

Haines, 160 App. Div. 503, (1904); but the failure to ask affirmative relief may be a mere informality, Born v. Schrenkeisen, 110 N. Y. 55. In Nebraska it is said that in ejectment equitable defences may be proved under a general denial, where affirmative relief is unnecessary, Dale v. Hunneman, 12 Neb. 221, (1881).

For a collection of cases on the mode of trial, see Nolan v. Pac. Warehouse Co., 67 Wash. 173, Ann. Cas. 1913D, 167.

sale, or those claiming under him. There must be a new trial; but, under the circumstances, the defendant should be permitted, on such terms as the circuit court shall deem just, to amend his answer so as to interpose such equitable defense and counter-claim.

The case of Kent v. Agard, 24 Wis. 378, does not conflict with the foregoing views. It was there held that in an action of ejectment a party may show, without specially pleading the fact, that a conveyance, absolute upon its face, is a mortgage, and that the debt for which it was given to secure has been paid. There is no doubt of the correctness of that decision, and it is perfectly clear that it is not applicable to this case.

Judgment reversed, and a new trial awarded.

LOCKE v. MOULTON.

Supreme Court of California, 1895. 108 Cal. 49.

VANCLIEF, C. Action of ejectment to recover possession of a half section of land. The complaint is in the most general form, alleging, in substance, that plaintiff owns, and is entitled to the possession of, the demanded premises, and that the defendants are in possession and wrongfully withhold it from the plaintiff.

In their answer the defendants deny that plaintiff ever owned the land, or that he was entitled to the possession thereof at the time of the commencement of the action; and, as a further answer, allege that on October 2, 1885, the defendant Moulton, who was then the owner and in possession of the land, executed to plaintiff a bargain and sale deed thereof, absolute in form, but which was intended by the parties thereto to operate only as a mortgage to secure payment to plaintiff of a debt of six thousand one hundred and twenty-seven dollars and fifty cents with interest; and that it was understood and expressly agreed by the parties at the time the deed was executed, that upon payment of the said debt the plaintiff would reconvey the land to Moulton. As a further answer the defendants alleged adverse possession for a period of five years, etc.

The answer closed with the following prayer: "Wherefore, defendants pray that plaintiff take nothing by reason of this

action; that it be adjudged that plaintiff is not the owner of, or entitled to the possession of, the real property described in the complaint, that it be decreed that the instrument in writing herein described was and is a mortgage, and that the defendants have judgment for their costs."

A former judgment in favor of the plaintiff in this case was reversed by this court and a new trial granted. (Locke v. Moulton, 96 Cal. 33.) After the remittitur was filed in the court below, to wit, on the first Monday in October, 1892, the case was called by the lower court for the purpose of setting a day for the new trial thereof, when the attorneys for defendants demanded a trial by jury, whereupon the court stated "that the defendants could have a jury on the common-law part of the action, but the court itself would try the equity part of the case," to wit, the issue as to whether the deed was intended to operate merely as a security for a debt. On December 1, 1892, the case was called for trial, when the defendants again demanded a jury trial upon all the issues in the case. The court again refused a jury trial on the issue as to whether the deed was intended to be a mortgage, and proceeded to try that issue alone. The result of such trial was a finding by the court that the deed "was not executed or delivered as a mortgage, and was not a mortgage of any kind, and was not to secure the payment of any money whatever." And, as a conclusion of law, found "that said deed was not a mortgage, but that it was a conveyance and grant of the title to said real estate from defendant Moulton to plaintiff." These findings were filed on December 27, 1892, and disposed of the only material issue except that as to adverse possession, upon which, it appears from evidence given on the issue tried, the defendants could not hope for a verdict in their favor.

Defendants moved for a new trial on all the grounds allowable under section 657 of the Code of Civil Procedure, presented by a bill of exceptions. This motion was denied, and the defendants appeal from the order denying it.

The only ground upon which appellants claim a reversal are: 1. Insufficiency of the evidence to justify the decision; and 2. That the court erred in refusing a trial of all the issues by a jury.

As to the first of these grounds, I think the evidence was substantially conflicting to a degree which precludes a review of

it by this court. But I think the court erred in denying a jury trial of the whole case.

The affirmative allegations in the answer, to the effect that the deed was intended as more security for a debt, do not constitute an equitable[10] defense in the proper sense of those terms, since they could have been proved under the general denials. (Smith v. Smith, 80 Cal. 329; Locke v. Moulton, *supra.*) They added nothing to the denials of plaintiff's alleged title. The defendants unnecessarily anticipated that plaintiff would rely upon the deed as evidence of his title, and improperly alleged the evidence by which they proposed to show that the deed did not convey the title. Of themselves, these affirmative allegations constituted neither a legal nor equitable defense to the action, and might have been stricken from the answer without impairing its legal effect.

But counsel for respondent contend that the character of the defenses is to be determined only by the prayer of the answer; and since defendants, in addition to their prayer "that plaintiff take nothing by the action," asked the court to adjudge that plaintiff is not the owner of the land, and that the deed is a mortgage, this affirmative relief could be administered only by a court of equity, and therefore it was within the discretionary power of the court to refuse to submit to a jury that part of the case upon which such equitable relief was to be based.

In the first place it is manifest that there is no basis in the answer for any affirmative relief of any kind, and, in the second place, even if the court should affirmatively adjudge, on the pleadings in this case, that the deed is a mortgage, and that plaintiff has not title, such judgment would add nothing in effect to the simple judgment "that plaintiff take nothing by the action."[1]

The only authorities cited to this point by counsel for re-

10 At an earlier period this was treated as an equitable defense in New York, Despard v. Walbridge, 15 N. Y. 374, (1857), and apparently in Wisconsin; for its evolution into a legal defence in Wisconsin, see Dobbs v. Kellogg, 53 Wis. 448, (1881). Compare Reilly v. Cullen, 159 Mo. 322, (1900) that affirmative action was necessary to convert such an instrument into a mortgage.

1 And so in Guaranteed Investment Co. v. The Copper Co., 156 Wis. 173, (1914) where a defendant in ejectment set up title by adverse possession and prayed a decree establishing his title.

spondent are People v. Mier, 24 Cal. 71, Arrington v. Liscom, 34 Cal. 375, 94 Am. Dec. 722, and Nevada etc. Co. v. Kidd, 37 Cal. 304; but that none of these is in point for respondent seems so obvious that I think it needless to point out the distinctions.

I think the order should be reversed and a new trial granted.

Judgment reversed.

CHICAGO & NORTHWESTERN RY. CO. v. McKEIGUE.

Supreme Court of Wisconsin, 1906. 126 Wis. 574.

WINSLOW, J. This is an action in equity brought to restrain the prosecution of an action at law theretofore brought by the defendant McKeigue as administator against the plaintiff. It appears by the complaint, in brief, that one Broderick was employed by the plaintiff as switchman, and on the 16th day of July, 1904, was so injured in course of his employment that he died about three hours later intestate, leaving no widow, descendents, or ancestors surviving, but only his sister, the defendant Johanna Murphy, his sole heir at law; that Johanna Murphy thereafter claimed damages of the plaintiff on account of Broderick's injuries; that said claim was afterwards and in the month of August, 1904, compromised and settled by the payment to said Johanna by plaintiff of $1,000; that said Johanna thereupon executed and delivered a written release of all claims resulting from said injury and death and agreed to save and keep the plaintiff harmless from all claims against it by heirs at law or personal representatives of Broderick; that the defendant McKeigue was appointed administrator of the estate of Broderick in September, 1904, and that the time fixed for presentation of claims against said estate has fully expired and that but one claim was presented and allowed; that the property of the estate in the hands of the administrator is largely in excess of the amount of said claim, and that there are no other creditors; that in October, 1904, said McKeigue, as administrator, commenced an action against the plaintiff to recover damages for the pain and injuries suffered by Broderick in his lifetime; and that if a recovery is had in said action the amount thereof will be received by said Johanna Murphy as sole

heir at law of Broderick, thereby nullifying the said compromise and satisfaction. Upon these allegations the plaintiff prayed judgment that the prosecution of the action at law be perpetually enjoined. Separate demurrers to this complaint were sustained, and the plaintiff appeals.

The appellant claims that the allegations of the complaint present a case where it appears that a trustee is prosecuting an action at law upon a claim which has been settled and compromised by the sole beneficiary (who is *sui juris*), and that a court of equity will interfere to prevent the accomplishment of such an injustice. Granting this premise, the question is whether the plaintiff has not an adequate and complete remedy by equitable defense[2] in the action at law. The plaintiff claims, in substance, that this question must be answered in the negative for the reason that the facts must be presented by way of equitable counterclaim, and to that counterclaim Johanna Murphy would be a necessary party, and as she is not a party to the action at law the counterclaim would not be well pleaded on account of defect of parties, or at least would not be as adequate and effective as the separate action in equity. The contention practically is that there is no such thing as an equitable defense; but that facts which in equity would defeat the plaintiff's claim at law must always be pleaded as a counterclaim, if pleaded at all in the action at law. We do not understand this to be the law. The Code recognizes equitable defenses as well as equitable counterclaims when it provides that the defendant may "set forth by answer as many defenses and counterclaims as he may have, whether they be such as were formerly denominated legal or equitable, or both." Stats. 1898, sec. 2657. It seems to be true that there are decisions to the effect that a defendant cannot plead facts which in equity would defeat the plaintiff's cause of action at law, except by way of counterclaim demanding affirmative relief. Pomeroy, Code Rem. (4th Ed.) § 29. This, however, is not the approved doctrine, nor is it a logical doctrine. The true and logical rule doubtless is that where facts are relied on which in equity simply defeat the

[2] See Haire v. Baker, 5 N. Y. 357, (1851), to the effect that the fact, that certain matters, such as fraud and mistake, may be available by way of equitable defence, does not preclude the defendant in the legal action from bringing an independent equitable action against the plaintiff for affirmative relief against the legal claim.

plaintiff's cause of action and go no further, they may be set up by equitable defense, just as facts which at law go simply to defeat the plaintiff's cause of action may be set up by legal defense, but in those cases where the action at law can only be defeated by virtue of an affirmative judgment by a court of equity, such for instance as the reformation of a contract sued on at law, the equitable defense must be made by way of counterclaim. In a word, facts which if true simply defeat the plaintiff's action may be set up as a defense alone, but facts which call for affirmative relief in favor of the defendant before the plaintiff's action can be defeated must be set up by counterclaim. Bliss, Code Pl. (3d ed.) §§ 347, 348, 349; Pomeroy, Code Rem. (4th ed.) §§ 90, 91, 92; Baylies, Code Pl. & Pr. (2d ed.) ch. 11, § 11. See also Pennoyer v. Allen, 50 Wis. 308, 6 N. W. 887.

Applying this rule to the complaint before us, it is very evident that the plaintiff has a complete remedy by equitable defense in the action at law.[3] The object of the present action is simply to defeat the plaintiff's action at law. No affirmative relief to the defendant is necessary to accomplish that object. The only result desired or necessary in this action is to prevent any judgment against the railroad company in the action at law. That may be accomplished by defense in the legal action brought by the administrator alone as well as by the prosecution of this equitable action to which Johanna is a party, for Johanna has no right of action herself. Hence the demurrers were properly sustained. Pennoyer v. Allen, *supra*. It may properly be noted before leaving the subject that there is an exception to the rules above stated, well settled in this state. In actions of ejectment a defense which is purely equitable and would not be available at law must be pleaded by way of counterclaim. The reason of this rule is that an equitable defense concedes the legal title to be in the plaintiff, so in order to bring

[3] Quaere as to how the issues arising on this equitable defence should be tried? Will it be treated as in effect, though not in form, a cross-action, triable by the court as in Gunn v. Madigan, ante. p. 600? Or will it be treated as a mere defence, triable by jury along with the other issues in the case? In the latter case, if the plaintiff relies on fraud to avoid the release, which in Wisconsin is apparently sanction at law, Whetstone v. Beloit Straw Board Co., 76 Wis. 613, ante p. 33, the jury may have quite a complicated problem.

For some comments on the subject of equitable defences. See 18 Michigan Law Review, 717.

the title and possession together affirmative relief must be sought by the defendant, and hence the ejectment statute requires that in case of an equitable defense the answer shall contain a demand for such judgment as the defendant claims, *i. e.* must be framed as a counterclaim. Stats. 1898, sec. 3078; Lombard v. Cowham, 34 Wis. 486; Du Pont v. Davis, 35 Wis. 631; Lawe v. Hyde, 39 Wis. 345; Dobbs v. Kellogg, 53 Wis. 448; 10 N. W. 623; Appelton Mfg. Co. v. Fox River P. Co., 111 Wis. 465, 87 N. W. 453. This rule, however, is peculiar to ejectment actions and does not affect the rule above stated with reference to actions generally. Mr. Pomeroy, in his work on Code Remedies (4th ed.), at sec. 29 seems to have thought that the rule laid down in these cases applied to all actions; but this is plainly an erroneous idea.

Orders affirmed.

McISAAC v. McMURRAY.

Supreme Court of New Hampshire, 1915. 77 N. H. 466.

Case for personal injuries alleged to have been caused by the negligence of the defendant in driving his automobile upon the plaintiff, who was riding a bicycle. * * *

The defendant pleaded the general issue, with a brief statement setting up a release of the plaintiff's cause of action. * * *

The plaintiff filed an answer to defendant's brief statement, alleging in substance that the release is fraudulent, was made under a mutual mistake of fact, and is void; that the physicians for both parties assured the plaintiff previous to the date of the release that his injuries were not serious, consisting of bruises, that no bones were broken, and that he would soon be able to resume his occupation; that both parties acted under a mutual mistake of fact as to the extent and nature of the plaintiff's injuries, which in fact consisted of a fracture of the neck of the femur of the left hip, and that this injury was unknown to either party when the release was executed.

After the plaintiff's counsel had opened the case to the jury upon the grounds of the above answer, the court ordered a non-

suit, on the assumption that the plaintiff's evidence would sustain his claim that both parties supposed at the time of the settlement that the injuries consisted of simple bruises only. To this order the plaintiff excepted.[4]

WALKER, J. The language of the release is sufficiently broad to cover all the damages suffered by the plaintiff in consequence of the collision and to preclude the plaintiff from maintaining an action against the defendant therefor. Its execution is admitted and its legal construction as constituting a bar to the plaintiff's action is not denied. But it is argued that it was entered into under mistake, made by both parties, in reference to a material matter of whose existence they were justifiably ignorant, and that the release would not have been made if that fact had been known and appreciated. The plaintiff, therefore, is practically seeking to have the release set aside, in order that he may proceed with his action at law. The superior court granted the defendant's motion for a nonsuit, and the plaintiff excepted.

One question presented by the exception is whether the plaintiff may have relief for the alleged mistake by a practical cancellation of the release, found to be equitable by the verdict of a jury in an action at law, or whether the fact of the mistake and its effect upon the contract should not be tried in an equitable proceeding in aid of the suit at law. It cannot be doubted that the jurisdiction in equity in relation to the subject of mistake in written contracts is ample and convenient. "The power of a court of equity to correct mistakes of fact is a very wide and general one." Bisp. Eq. (7th ed.) s. 190. "Cases in which the remedy sought and obtained is one which equity courts alone are able to confer must, upon any consistent system of classification, belong to the exclusive jurisdiction of equity." 1 Pom. Eq. Jur., s. 138. * * *

Although one reason of the rule is that the remedy sought in cases of mistake in written instruments is peculiarly applicable to proceedings in equity, relief in most cases could not be obtained at law, because parol evidence which tends to vary and contradict such a writing is not admissible, while in equity it is. "A written contract that does not express the intention of the parties may be reformed in equity; but in this suit at law the

4 Statement condensed and parts of the opinion omitted.

policy cannot be altered by parol evidence." Tasker v. Insurance Co., 59 N. H. 438. * * *

In Sherburne v. Goodwin, 44 N. H. 271, 277, it is said: "It is urged also for the plaintiffs that if the terms of the release are such as to include this fund it is a mistake, and that the release should be reformed. But independent of the question whether any such mistake is shown as would entitle the party to this sort of relief, it is quite clear that it could be granted only upon proceedings instituted for that purpose, and under such circumstances as would enable the court to do justice to both parties, and not by simply excluding from the effect of the release the particular demand, and thus evading the rule that prohibits the introduction of parol evidence to contradict a written instrument."

Another reason why relief for mistake in a written contract should be sought in equity is that courts in equity seem in such case to have adopted a more stringent rule as to the burden of proof or the weight of the evidence than obtains at law, in order probably to show that in equity the parol evidence rule is recognized and is not to be lightly set aside. This principle was considered in Searles v. Churchill, (69 N. H. 530) *supra,* where it was held that a written instrument will be reformed in equity when it fails to express the intention of the parties in making the contract which it purports to contain; and to warrant such decree, the mistake alleged must be esablished as matter of fact by clear and convincing proof. Tilton v. Tilton, (9 N. H. 385) *supra;* Busby v. Littlefield, (31 N. H. 193) *supra;* Wiswall v. Harriman, 62 N. H. 671; Healy v. Healy, 76 N. H. 504. It is unnecessary in this discussion to attempt to define what is meant by "clear and convincing proof"; it is sufficient to note that it must at least be strong enough to overcome the presumption that the written instrument contains the essential terms of the contract, upon which presumption the rule excluding parol evidence of the intention of the parties is based. Howlan v. Blake, 97 U. S. 624, 626.

In view of the uncontroverted fact that the remedies of rescission and reformation of contracts entered into in consequence of the mutual mistakes of the parties fall primarily and naturally within the peculiar jurisdiction of equity, and in view of the further fact that the principles governing equitable precedure in such cases are better adapted to the ascertainment

of truth and the accomplishment of substantial justice, it cannot be doubted that the plaintiff must first obtain relief in equity from the effect of his general release, before attempting to charge the defendant in an action of tort for the consequences of the latter's alleged negligence.[5]

The plaintiff's exception to the ruling of the superior court ordering a nonsuit must, therefore, be overruled. But under the liberal procedure adopted in this jurisdiction, his answer to the defendant's brief statement may be treated as a bill in equity, in which relief is sought to remove the impediment created by the release to the maintenance of his action at law. Stebbins v. Robbins, 67 N. H. 232. The question would then be whether upon these allegations relief could be granted.[6] * * *

If, as the plaintiff alleges, the statment of the defendant's physician that the plaintiff's injuries were slight and that no bones were broken was fraudulently made for the purpose of bringing about a compromise, and the plaintiff relied upon that representation when he executed the release, a distinct claim for relief would be presented which it would not be useful to discuss at this time. Upon the present state of the case, the order is,

Exception overruled.

5 Acc. Perry v. O'Neill 78 Ohio St. 200, (1908); Hancock v. Blackwell, 139 Mo. 440, (1897), where the case was remanded to allow the plaintiff to amend the complaint by adding an equitable count to set aside the release attempted to be attacked by the reply in the original case. By a later amendment to the Missouri Code a reply of fraud is expressly permitted in such cases, and the issue made triable by jury, Non-Royalty Shoe Co. v. Phoenix Ins. Co., 210 S. W. 37, (1919): For a collection of the cases see Alston v. Oregon Water Co., 20 L. R. A. (N. S.) 915, (1908). That section 274b of the U. S. Judicial Code does not, in such a case, allow a reply in the nature of a bill in equity, see Keatley v. U. S. Trust Co., 249 Fed. (C. C. A.) 296, (1918).

6 For a collection of cases on mistake as an equitable defense, see note to the principal case in L. R. A. 1916 B. 769.

IV. *By Way of Counterclaim.*

VASSEAR v. LIVINGSTON.

Court of Appeals of New York, 1855. 13 N. Y. 248.

The action was brought in 1853 by the plaintiff, as the assignee of Alexander H. Ritchie, and the complaint set forth that the defendant employed Ritchie to engrave four likenesses for $50 each, which Ritchie, it was alleged, had done, and that the defendant had refused to receive the plates and pay for the engraving; and furthermore that Ritchie had assigned the demand to the plaintiff. The answer denied the allegations of the complaint, and as a further and separate answer set forth that Ritchie had agreed to engrave the four plates from daguerreotype portraits for the defendant, and to finish and deliver them within six weeks from April 2nd, 1853; that he had failed to perform that agreement; that the portraits were designed, as Ritchie knew, for illustrations of a periodical publication issued by the defendant, and that the latter had sustained damages on the account of Ritchie's default in the premises to $200, which the defendant claimed to recoup and set-off against any damages to be established by the plaintiff. The answer concluded by praying judgment for damages against the plaintiff of $200. No reply was put in.

On the trial before Chief Justice Oakley, the defendant, before any evidence was given, asked for a dismissal of the complaint, on the ground that the answer contained a counter-claim, which, there being no reply, was admitted; and as the damages of the defendant, as stated in the answer, were equal to the claim made by the plaintiff, there could, it was claimed, be no recovery in favor of the plaintiff. The motion was denied and the defendant excepted. * * * Verdict for the plaintiff. The judgment was affirmed at the general term, whereupon the defendant appealed to this court. The case was submitted on printed points.

MARVIN, J. Upon the trial, previous to the introduction of evidence, the defendant moved that the complaint be dismissed on the ground that the answer contained material allegations of new matter, constituting a counter-claim for $200, and as it had not been controverted by a reply, the allegations must, for the

purposes of the action, be taken as true, and the plaintiff's claim being only $200, the defendant was entitled to a judgment upon the pleadings. This motion was denied, and the defendant excepted. This decision presents the most important question in the case, and I think the defendant has misapprehended the effect of the pleadings. Let us bring here under notice the provisions of the Code which, it is supposed, control the question. The answer is to contain: (1) A general or specific denial of each material allegation of the complaint controverted by the defendant; (2) A statement of any new matter constituting a defense of counter-claim. (Code § 149.) The counter-claim must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment may be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; (2) In an action arising on contract, any other cause of action arising on contract, and existing at the commencement of the action. (§ 150.) When the answer contains new matter, constituting a counter-claim, the plaintiff may, within twenty days, reply to such new matter, denying generally or specifically each allegation controverted by him, &c. (§ 153.)

By § 168, every material allegation of new matter in the answer, constituting a counter-claim, not controverted by the reply, shall for the purposes of the action be taken as true.

A good cause of action was set forth in the complaint, and the defendant, by his answer, put in issue the material allegations of the complaint. The new matters pleaded did not dispense with the necessity of trying the issues formed directly upon the complaint. The defendant did not, and does not now claim that the new matter in the answer showed that the plaintiff had no cause of action, but he claimed that the new matter showed that he, the defendant, had a cause of action or counter-claim against Ritchie, the assignor, in which his damages were equal to the damages claimed by the plaintiff, and that when these damages were set-off or recouped, they left the plaintiff without any right to damages, and that therefore his complaint should be dismissed. This position cannot be sustained. The new matter stated constituted in no sense a set-off. It constituted, if applicable to the case made by the complaint that is, if it related to

the same contract or employment stated in the complaint, a defense upon the ground of failure on the part of Ritchie to perform the agreement. A set-off could in no way arise out of such failure. Did the answer, in which the defendant proposed to recoup and set-off his damages, state facts authorizing a recoupment, or facts involving the doctrine of recoupment in any wise? Clearly not. The facts, assuming that the pleader intended them to apply to the cause of action stated in the complaint, did not involve the doctrine of recoupment in any form. They showed a special agreement with Ritchie in relation to the engraving, and a failure on his part to perform the agreement, whereby the defendant alleges that he sustained damages. He had never received the engravings. If the facts stated were true, then he had a good cause of action against Ritchie for damages for a breach of the special agreement, but Ritchie had no cause of action against him. In short, the very facts which would give the defendant a cause of action against Ritchie for damages for a breach of the agreement, would show that Ritchie never had any cause of action against him, and there would be nothing out of which to recoup his damages. Recoupment always implies that the plaintiff had a cause of action, but the defendant alleges that he too has a cause of action growing out of a breach of some other part of the contract upon which the action is founded, or for some other cause connected with the contract, and it is in the nature of a cross action. Under the former system of pleading the defendant could not make the defense by a special plea in bar, as it was a rule that such plea must state facts forming a bar to the action, whereas recoupment in its very nature admitted the plaintiff had a cause of action. (Nichols v. Dusenbury, 2 Comst. 284.)

The counter-claim of the Code is undoubtedly broader and more comprehensive than set-off and recoupment. It authorizes a resort by the defendant, to causes of action by way of defense, other than set-off or recoupment. It has attempted, however, to limit and define the defendant's rights. It clearly authorizes set-off and recoupment, and I had no doubt they were authorized by the first Code, under the word defense, in the section relating to the answer. However that was, it is clear they are authorized by the amendments of 1852, and something more. By the second subdivision of § 150, in an action arising on contract, the defendant may avail himself by way of defense of any other

cause arising on contract, and existing at the commencement of the action. It is not claimed by the defendant that this provision has any application to the present case. It is claimed that the plaintiff, as assignee of the demand, took it subject[1] to all equities to any set-off or right of recoupment which the defendant had, and this claim is undoubtedly well founded. As we have seen, the defendant had no right of set-off, recoupment, or cause of action against this plaintiff, who by becoming assignee did not subject himself to a cause of action existing against his assignor[2] so as to have judgment against him for damages. If the provision of the Code just cited, should be construed as authorizing a defendant, when sued by an assignee in an action on contract, to avail himself of any other cause of action on contract against the assignor, so far as to satisfy or compensate the damages in the action by the assignee against him, it would not benefit the defendant in this case. Here the facts stated in the answer related to the same engagement or contract, upon which the plaintiff's action was founded, and if the plaintiff had a good cause of action, the defendant had none. If the plaintiff, as assignee of Ritchie, had no cause of action, then the defend-

1 By section 112 of the original code it was provided that in case of an assignment of a thing in action, the action by the assignee should be without prejudice to any set off or other defence existing at the time of or before notice of the assignment, except in cases of negotiable instruments transferred in good faith, etc. before maturity.

The Act of 2 Geo. 2, c. 22, s. 13, provided that where there were "mutual debts" between the plaintiff and the defendant, one debt might be set off against the other. Similar statutes were in effect in the several states at the time of the adoption of the code. In most instances the statute of set-offs was retained after the Code provision for counterclaims. For a discussion of what constitutes mutual indebtedness within the meaning of such statutes, see Morris, trustee, v. Windsor Trust Co., 213 N. Y. 27, (1914).

In the Code of 1876, section 112 was supplanted by section 1909, which provided for actions by the assignee, subject to any defence or counterclaim, existing against the transferor before notice of transfer, or against the transferee. By section 267 of the Civil Practice Act of 1920, a counterclaim against the plaintiff's assignor must be allowed to the amount of the plaintiff's demand.

2 That the usual provision found in the Code authorizing necessary parties to be brought into the case, does not enable a defendant to force the plaintiff's assignor to be made a party in order to set up a legal counterclaim against him, see State ex rel. v. Superior Court, 194 Pac. 412, (Wash. 1920), and comments by Professor Sunderland in 19 Mich. Law Rev., 540.

ant had no cause of action against Ritchie, which he could use against the plaintiff. In short, it was necessary to try the issue joined by the denial in the answer, and upon the trial of that issue all the rights of the defendant in this action could be protected. If Ritchie failed to perform his agreement the plaintiff could not recover, and the defendant then, if he had sustained damages by a breach of the agreement by Ritchie, could bring his action against him. The facts stated in the answer did not constitute a counter-claim, and no reply was necessary to put them in issue. No error, therefore, was committed in refusing to dismiss the complaint. * * *

Judgment affirmed.

RESCH v. SENN.

Supreme Court of Wisconsin, 1872. 31 Wis. 138.

Action upon a promissory note executed by the defendants to the plaintiff. Complaint in the usual form. The answer admits the making and delivery of the note as alleged in the complaint, and "for further defenses" states certain facts, which, if true, show that the note was fraudulently obtained and without consideration. It also contains the following demand for relief: "Wherefore the defendants demand that the complaint of the plaintiff be dismissed, and that these defendants be allowed their costs; that the said note be delivered up and cancelled; and for such other and further relief as to the court may seem just and equitable." To this answer there was no reply.

When the action was brought to trial, and before any other proceedings were taken, the defendants moved the court for judgment upon the pleadings, on the ground that the answer constitutes a counterclaim, to which there was no reply. The court overruled such motion, and the plaintiff then read the note in evidence, and rested his case. The defendants thereupon renewed the motion for judgment, which was again overruled by the court. No testimony was offered by the defendants and no other or further testimony was given on the trial.

The plaintiff had a verdict and judgment for the amount due on the note by its terms; and the defendants appealed.

LYON, J. The only question to be determined on this appeal is, Does the answer contain a counterclaim? If it does, it would seem that the motion of the defendants for judgment for want of a reply should have been granted, although no notice of the motion was served as provided by the statute, R. S., ch. 125, sec. 16. But, however this may be, the failure to reply to a counterclaim is an admission by the plaintiff that the same is true, and a judgment in his favor entered on the trial, in the face of an admission made by the pleadings that there ought to be no such judgment, is clearly erroneous, and should be reversed. Bridge v. Payson, 5 Sandf. 210. If the answer does not contain a counterclaim, the judgment should be affirmed, inasmuch as the execution of the note was admitted, as well as proved, and there was no testimony given or offered tending to show that it was not a valid note.

It is the first essential of a counterclaim that it shall of itself be a distinct cause of action existing in favor of a defendant and against the plaintiff, between whom a several judgment might be had. R. S., ch. 125, sec. 11; Matteson v. Ellsworth, 28 Wis. 254.

In the present case, unless the defendants could have maintained an equitable action against the plaintiff to compel him to surrender the note in suit for cancellation, the answer does not contain a counterclaim, but only a defense, to which no reply was necessary or allowable.[3]

We are not aware that it has ever been held that an action in equity may be maintained by a party to an overdue promissory note, to compel a surrender thereof for cancellation, especially after a suit at law has been brought upon the note, in which suit every objection to the validity of the note is available as a defense. Suppose, under the practice before the code, this action had been brought, and the defendants had filed their bill in equity to restrain proceedings therein, and to compel the plaintiff to surrender the note to be cancelled. Would not the chancellor have said to the complainants, the makers of the note, that they had an adequate and complete remedy at law, by setting up in the action against them the alleged fraud and want of consideration as a defense?

3 Under the Wisconsin Code, which differs somewhat from the New York Code in this respect.

The doctrine of the jurisdiction of courts of equity in such case is very ably discussed by Chancellor Kent, in Hamilton v. Cummings, 1 Johns. Ch. R. 517; and, after reviewing the English authorities, he states his conclusions as follows:

"Perhaps the cases may all be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defense, not arising on its face, may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper and clear of all suspicion of any design to promote expense and litigation."

In the present case there is no such liability to abuse because of the negotiable character of the note, for it is overdue, and a transfer of it would not prejudice the defendants; neither is the defense to the note, if true, difficult or uncertain at law, but plain, easy and complete; neither are there any special circumstances, such as delay in prosecuting the note, which afford grounds for the interposition of a court of equity.

We are of the opinion, therefore, that the answer does not contain a counterclaim, because after the action was commenced the defendants could not have maintained an action against the plaintiff to compel him to surrender the note for cancellation. See Matteson v. Ellsworth, *supra*.[4]

But, conceding that the facts stated in the answer constitute the proper subject matter of a counterclaim, yet they are not pleaded as such, but are expressly pleaded as a "defense." Had the answer simply stated the facts, and demanded affirmative relief, it might be held to constitute a counterclaim under our decision in Gunn v. Madigan, 28 Wis. 158; but it is difficult to perceive on what principle the averments in an answer, which

[4] And so in Lock v. Moulton, 108 Cal. 49, (1895), ante p. 611. Guaranteed Investment Co. v. Copper Co., 156 Wis. 173, (1914). See also Holzbauer v. Heinz, 37 Mo., 443, (1866), where the attempted counterclaim amounted simply to the defence of payment. Where the same state of facts would constitute either a counterclaim or a defense, the absence of any demand for judgment or affirmative relief characterizes the pleading as defensive merely, Gunn v. Madigan, 28 Wis. 158, (1871), ante p. 600.

the pleading expressly says are interposed as a *defense,* can be held to constitute a *counterclaim.* In Burrall v. De Groot, 5 Duer 379, an answer almost precisely like this was held not to amount to a counterclaim, and we think the ruling in that case was right.

Judgment affirmed.

BATES v. ROSEKRANS.

Court of Appeals of New York, 1867. 37 N. Y. 409.

The action was brought upon a joint and several promissory note, dated September 11, 1851, for the payment of $2,553.71, made by the defendant and one Andrew Bigham to the order of and indorsed by Bates & Griffin. On the trial the defendant's counsel made a motion for judgment upon the pleadings, upon the ground that the plaintiff had not replied to the counter claims of the defendant contained in the answer. The court overruled the motion, and the defendant's counsel excepted. * * * The court directed a verdict for the plaintiff for the amount of the note. The General Term affirmed the judgment entered upon the verdict, and the defendant now brings his appeal to this court.[5]

HUNT, J. * * * The defendant insisted at the trial, and his counsel now argue, that he was entitled to judgment at the circuit, on the ground that the plaintiff had not replied to the counterclaims contained in his answer. The fifth answer contains the statements that are the most strenuously insisted upon as constituting a counter claim, and an examination of that will suffice for the whole. The defendant therein alleges, "as a further defense," that the note in the complaint described arose out of partnership transactions, of which the defendant and one Bigham were members, and was given for the benefit of the partnership, which facts were known to the plaintiff, and afterward Bigham transferred all his interest in the partnership property to the plaintiff, who was then the holder of the note, and, in consideration thereof, the plaintiff agreed with Bigham

[5] Statement condensed and part of the opinion omitted.

to pay his share of the debts of the partnership, and any balance due from him to the partnership, and to cancel the note; that Bigham's share of the debts amounted to more than the note; that Bigham owed the partnership a balance greater than the amount of the note, and the plaintiff has received, and holds, under the assignment, property of more value than the amount of the note, and that he has not paid any part of the partnership debts, and refuses to apply the partnership property to the payment of said debts. The defendant does not pretend that he was precluded from making proof of the allegations contained in this answer, and thus establishing the equitable defense arising from the statements therein contained. He insists that by the rules of pleading in existence at the time of the trial, a "counter claim" was to be taken as true, unless it was formally denied by the plaintiff, and that, no denial having been made in the present case, he was of right entitled to a judgment upon the pleadings. The court below held the pleading to be an answer and not a technical counter claim, and overruled his demand for judgment. This decision was right for several reasons.

The first ground is that the answer states no claim "existing in favor of the defendant against the plaintiff." The code is express that the claim "must be one existing in favor of a defendant and against a plaintiff." (Code, § 150; Vassear v. Livingston, 3 Kern 248.) The claim, as stated in the pleading, is in favor of Bigham, or of his representatives, if he is dead, and not of the defendant. It was Bigham, and not the defendant, who transferred the property to the plaintiff. It was to Bigham, and not to the defendant, that the plaintiff made the promise to pay the partnership debts and to cancel the note. It was to Bigham, and not to the defendant, that he was bound to account for the property, or its proceeds, if he failed to make a proper application of it. A perfect cause of action exists in favor of Bigham if the statements of the answer are true, possibly also in favor of the holder of the note or a creditor of the firm, but none in favor of the defendant,[6] himself one of the

[6] Accord: Gillespie v. Torrance, 25 N. Y. 306, (1862): Etlinger v. Surety Co., 221 N. Y. 467, (1917). But a cause of action in favor of another may be available to the defendant as a set off, and the fact that it is pleaded as a counterclaim will not deprive the defendant of the benefit of such matter as a set off, West Allis Lumber Co. v. Wiesenthal, 141 Wis. 460, (1910).

debtors in the transaction. (Beardsley Scythe Co. v. Foster, 36 N. Y. 561.) While it is unnecessary to decide whether these circumstances would afford an equitable defense to this action, it is clear that they do not avail the defendant in the technical aspect in which he here seeks to defeat the plaintiff's right of recovery.

I think the answer given by the court below is also a sound one, to wit, that the pleading does not purport to be a counter-claim. It designates itself as "a further defense" simply, and there rests. No particular form of words is necessary to make a pleading a counter claim; and if the party had, in any reasonable language, intimated that he intended to make a personal claim in his own favor against the plaintiff, it would have been sufficient. The ordinary and most satisfactory form of giving that intimation, is by a statement that the pleading is a counter claim, or by a prayer for relief. The present pleading, however, contains no words that would have justified the plaintiff in supposing that any personal judgment was sought against him, and in preparing for that emergency.

Judgment affirmed.

CUSHING v. SEYMOUR & CO.

Supreme Court of Minnesota, 1883. 30 Minn. 301.

The plaintiff had given defendant a chattel mortgage on certain personal property to secure several promissory notes. Before the maturity of the notes, defendant took possession of the property and attempted to foreclose by notice and sale. Plaintiff brought this action for the conversion of the property and recovered full value.[7]

BERRY, J. * * * If, upon the facts of the case, it was to be charged for a wrongful conversion of the property seized, the defendant insisted upon its right to have the amount of the two unpaid notes held by it, and secured by the chattel mortgage, both of which had matured at the time of the trial, deducted from the whole amount of damages to which the plain-

[7] Statement condensed and part of the opinion omitted.

tiffs should otherwise be found entitled. But the trial court was of opinion that the deduction was not allowable, and ruled accordingly. Though there is some conflict of opinion upon the subject, we think the ruling wrong, both upon the weight of authority and upon reason. When the assumed conversion occurred, the position of the parties was this: The plaintiffs had a cause of action against defendant for the conversion of property in which their (the plaintiffs) interest was a right of redemption, (Fletcher v. Newdeck, [30 Minn. 125] *supra*) the value of which was the difference between the whole value of the property and the amount of the debt secured by the mortgage. The plaintiffs were also entitled to the possession and use of the property until default in payment of the debt or some part of it, or until defendant, deeming its debt insecure, for just cause, took possession of it on that account. But, as respects the value of the property, plaintiffs were entitled to recover such a sum as would equal the value of their interest in it, for this would be compensation, which is the purpose of damages; and as the value of their interest was the difference before spoken of, it follows that the defendant was entitled to deduct from the whole value of the property converted the amount of the two unpaid notes secured by the mortgage. This result secures compensation, prevents circuity of action, and is sanctioned by authority. Brierly v. Kendall, 17 Q. B. 937; Johnson v. Stear, 15 C. B. (N. S.) 330; Brown v. Phillips, 3 Bush (Ky.) 656; Russell v. Butterfield, 21 Wend. 300; Brink v. Freoff, 40 Mich. 610, and 44 Mich. 69; Ball v. Liney, 48 N. Y. 6; Fowler v. Gilman, 13 Met. 267; Chamberlin v. Shaw, 18 Pick. 278; Field on Damages, §§ 816, 822; Wood's Mayne on Damages, § 514. These authorities go upon the principle that where a plaintiff's title to or interest in a thing is partial, damages for its conversion by one holding the rest of the title or interest should, as respects the value of the thing, be partial also.

In this view the notes were admissible, without being specially pleaded,[8] for that purpose, because, in connection with the mort-

[8] Compare Anderson v. Wilson, 132 Minn. 364, (1916).

For an unusual situation where the plaintiff's liability for a breach of warranty in a conditional sale was set up as extinguishing the balance due on the purchase price, and thereby defeating plaintiff's action for the possession of the goods, see Penser v. Marsh, 218 N. Y. 505, (1916).

gage, they went directly to disprove the allegation of the complaint as to the *quantum* of plaintiffs' interest in the property converted and their damages. The complaint alleged a general and unqualified ownership of the property by plaintiffs, and accordingly alleged and claimed damages for its full value. The mortgage, in connection with the notes, went to show that plaintiffs' right in the property (aside from the right of possession before spoken of) was a right of redemption, the value of which was the value of the property less the amount of the unpaid notes. Though the mortgage and notes are in a sense new matter, their evidentiary effect is not in support of a confession and avoidance, but they tend directly to disprove averments of the complaint which plaintiffs must prove in order to make out their alleged cause of action. They therefore support the general denial in defendant's answer, and are provable under it. Bliss on Code Pl. §§ 327, 328, 352, and notes; Pomeroy on Remedies, §§ 670, 673; O'Brien v. McCann, 58 N. Y. 373; State v. Williams, 48 Mo. 210. * * *

Judgment reversed.

TAYLOR v. ROOT.

Court of Appeals of New York, 1868. 4 Keyes 335.

WOODRUFF, J. The agreement, set forth in the complaint herein as the foundation of the action, required the defendants to divide the net proceeds of the publication of the New York Register, etc., into five parts. Two of these parts the defendants were to retain to themselves, and one of the remaining three parts they were to pay to each of the plaintiffs.

The plaintiffs were entitled to an accounting; but although they joined in an action to compel the defendants to render an account, they could not thereby change the several nature of their respective claims to payment. When the amount of net proceeds was ascertained or admitted, each plaintiff was entitled to an equal one-fifth part thereto; and a judgment declaring the several amounts due to each plaintiff, from defendants, would have been legal and appropriate. Hence, as to either of the plaintiffs, if the defendants had averred and proved pay-

ment in full of his share of such proceeds, the defense as to such plaintiff, would have been effectual to prevent a recovery, and yet the other two plaintiffs would have been entitled to judgment for the several amounts of their shares.

For example, suppose the defendants' answer had admitted the liability to account,—admitted the amount of the net proceeds, and the amount of each share of one-fifth,—claimed to retain two shares,—admitted that one share was due to each of certain two of the plaintiff's,—but, as to the other plaintiff, averred that the defendants had paid to him his share in full. This would, as to such last named plaintiff, have been a defense, and if proved, would have prevented his recovery.

The same principle is applicable to a defense in the nature of a set-off or counterclaim under our Code of Procedure.

By section 150, a counterclaim must be one, existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action.

As in the case of payment to one of the plaintiffs of his share in full or in part, the judgment might properly be several in respect of the amounts to be paid to the other two plaintiffs or in respect of a balance, if any, due to the third, so in the case of a counterclaim in favor of the defendants against either of the several plaintiffs.

The plaintiffs' claim is undoubtedly correct, that where the cause of action is strictly joint,[9] and the recovery, if had, is for the joint benefit of the plaintiffs; as for example, where the plaintiffs are partners, asserting the right of the copartnership firm as such to recover, and like cases,—in which it would be wholly incompetent for the defendants to enter into any attempt to state the accounts between the plaintiffs, to ascertain what portion of the recovery would ultimately inure to the benefit of each—the defendants could not set off or counter claim the individual debt of either plaintiff to defeat or reduce a joint

[9] So where the liability of the defendants is joint only, a demand in favor of one or some of them is not available as a counterclaim, Coffin v. McLean, 80 N. Y. 560, (1880). But where the liability of the defendants is joint and several, the fact that they are sued jointly will not prevent one of them from setting up a counterclaim in his own favor, though the effect is necessarily to reduce or extinguish the liability of all, American Guild v. Damon, 186 N. Y. 360, (1906).

recovery; nor here, could the separate or individual debt of either be set up as a set-off or counterclaim to affect the several right of the other plaintiffs to an accounting, or to defeat or diminish their recovery of the several amount of the share due to each of them.

But where, by the contract itself, the fund is divided, and one share, specifically mentioned, is due to each, so that allowing the set-off as to one only, affects the judgment as between him and the defendants, and in no wise affects the recovery, in favor of the others, for the full share due to each, then the claim of the plaintiffs is several within the meaning of the section of the Code referred to, and a set-off or counterclaim is expressly allowed. A judgment declaring their separate or several rights is proper. No accounting between the plaintiffs to settle their respective interest in the proceeds is required, nor could it be allowed to affect the rights of the defendants as against each plaintiff; the plaintiffs' interests are expressly defined and declared in the agreement upon which the action is founded, viz., one-fifth to each.

The question here is, not whether the right to an account is strictly joint, nor whether the defendants could have been subjected to three separate actions to compel an accounting to each plaintiff. If it be conceded, for the purposes of this appeal, that the plaintiffs could join, as they did, in bringing the action, or conceding, even further, that they must join, it still remains true that the judgment will appropriately award to the plaintiffs severally, each one-fifth part of the proceeds ascertained thereby; and payment to either plaintiff would defeat his claim and leave the others to have judgment awarding to each of them his share; and a set-off or counterclaim would have its several operation in like manner.

2. If, then, the claim of the defendants against the plaintiff, Hartshorne, was one which, within the provisions of the Code, was a proper subject of counterclaim, the referee erred in rejecting it, when he should have allowed it against the one-fifth of the proceeds which the defendants had agreed to pay to Hartshorne.

The claim was a judgment against the plaintiff, Hartshorne, recovered, assigned to and held by the defendants before the commencement of this action.

The Code of Procedure, in declaring what may be allowed as

a counterclaim, provides, that a defendant may set up, "in an action on contract, any other *cause of action* arising *also on contract,* and existing at the commencement of the action."

It appears by the case, that the referee rejected the defendants' claim, on the ground that the judgment held by them against Hartshorne, was recovered in an action "founded *not on contract* but *on tort,* being for slanderous words spoken by the said Hartshorne" of and concerning the plaintiff therein.

This was erroneous. The nature of the action wherein the judgment was recovered and the cause thereof were wholly immaterial, and in no manner affected the right of counterclaim; the error of the referee either proceeded upon a misapprehension of the meaning of the Code, above cited, or it overlooked the elementary definitions in the law of contracts.

Contracts are of three kinds: simple contracts, contracts by specialty, and contracts of record. A judgment is a contract of the highest nature known to the law. Actions upon judgment are actions upon contract. (See Blackstone, Chitty, Addison, Story, Parsons, or any other elementary writer on contracts.) The cause or consideration of the judgment is of no possible importance; that is merged in the judgment. When recovered, the judgment stands as a conclusive declaration that the plaintiff therein is entitled to the sum of money recovered. No matter what may have been the original cause of action, the judgment forever settles the plaintiff's claim and the defendant's assent thereto; this assent may have been reluctant, but in law it is an assent, and the defendant is estopped by the judgment to dissent. Forever thereafter, any claim on the judgment is setting up a cause of action on contract. It is strictly an action *ex contractu,* if suit is brought thereon; it is no less *ex contractu* when set up as a counter claim.

For this error of the referee the judgment must be reversed, and a new trial ordered that the counter claim may be allowed.

Ordered accordingly.

HOPKINS v. LANE.

Court of Appeals of New York, 1882. 87 N. Y. 501.

EARL, J. This action was brought to recover on a promissory note given in part payment of cheese sold by the plaintiffs to the defendant, Daniel W. Lane, and to Darius W. Benjamin and Quincy Matthewson. The cheese was delivered and each of the purchasers gave a note for his share of the purchase money. This note was given by Daniel W. for his share, and was signed by Victory L. Lane as surety for him. The defendants, in their answer, set up a counter-claim for breach of warranty and fraud in the sale of the cheese. One of the grounds upon which the defendants were defeated as to the alleged counter-claim at the trial was that they could not avail themselves of it, as it belonged to the three purchasers jointly. The answer alleged that the sale of the cheese was to the three as joint purchasers, and that allegation was sustained by the proof. There was no proof showing that there was a separate contract with each purchaser or a separate warranty to, or fraud perpetrated upon, each purchaser. For the convenience of the purchasers, and with the consent of the sellers, the cheese was paid for by the separate notes properly secured of the purchasers, and, after the notes were thus given, there remained no joint obligation to pay for the cheese, simply because it had been paid for. Payment in this mode, however, did not affect the contract of purchase, or the relation of the parties growing out of the joint purchase. Any claim, therefore, for damages, growing out of the breach of warranty or the fraud, belonged to the three purchasers jointly and could not be used by one of them as a counter-claim. One of them could not have separately sued the plaintiffs to recover such damages, and hence one of them separately cannot set up such damages as a counter-claim under section 150 of the code of procedure. As there was no defense to this note, except by way of counter-claim, Daniel W. Lane was obliged to pay it, and the claim for damages on account of the breach of warrant and fraud could be enforced only by an action in the name of all the purchasers against the sellers. If however, any one of the purchasers refused to join as plaintiff in such an action, he could be made a defendant. We are, there-

fore, of the opinion that the judgment should be affirmed with costs.

Judgment affirmed.

RITCHIE v. HAYWARD.

Supreme Court of Missouri, 1880. 71 Mo. 560.

HOUGH, J. This was a suit to recover the value of 600 gunny sacks alleged to have been wrongfully converted by the defendants to their own use. The defendants admitted that the sacks came into their possession, and that they had not returned the same, and set up by way of counter-claim that the plaintiffs, at the time named in the petition, agreed to sell and deliver to the defendants, on board a steamboat at Muscatine, Iowa, for transportation to Hannibal, Mo., which was then the defendants' place of business, 1,046½ bushels of choice peach-blow potatoes in gunny sacks, at the price of sixty cents per bushel, the said sacks to be returned by the defendants to the plaintiffs; that, in consideration of said agreement, and relying upon the honesty and good faith of the plaintiffs, the defendants then and there paid to the plaintiffs, in advance, the sum agreed to be paid for said potatoes, to-wit: $627.90; that the potatoes delivered by the plaintiffs under the said contract were much inferior in quality to the potatoes paid for, and agreed to be delivered, and were delivered in the same sacks, to recover the value of which the present suit was brought; that, by reason of the failure of the plaintiffs to comply with their contract, the defendants had been damaged in the sum of $141, for which sum they prayed judgment.

That portion of the defendants' answer setting up a counter-claim was, on motion, stricken out by the court, on the ground that a counter-claim founded upon a contract could not be pleaded to an action founded on a tort. This ruling of the court has been assigned as error. The counter-claim allowed by the statute must be one existing in favor of the defendant and against the plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: First, a cause of action arising out of the contract or

transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action; second, in an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action. R. S. § 3522.

The counter-claim pleaded by the defendants, if it be such as the statute recognizes, must fall within the first class. If the facts stated by the defendants be true, they certainly have a cause of action against the plaintiffs. It is not, however, a cause of action arising out of any contract set forth in the petition, for no contract is therein set forth. The facts set forth in the petition are that the defendants came into the possession of certain sacks belonging to the plaintiffs and wrongfully converted them to their own use. These facts constitute in a legal sense a "transaction," which is a more comprehensive term than "contract." Xenia Bank v. Lee, 7 Abb. Pr. 372. The details of the transaction, the evidential facts, are not stated, but the ultimate facts only, those which will entitle the plaintiffs to relief, when established by other facts proved at the trial. It is plain, however, that the word "transaction"[10] as employed in the code cannot be restricted to the simple statement of the wrong complained of by the plaintiff, for it would seem to be impossible that a cause of action could accrue to the defendant out of an injury inflicted by him upon the plaintiff. It must be held to include, therefore, all the facts and circumstances out of which the injury complained of by him arose, and if these facts and circumstances also furnished to the defendant a ground of complaint, or cause of action, against the plaintiff, the defendant will be entitled to present such cause of action as a counterclaim, showing by proper averments that it is a part of the same

10 See also McGregor v. Auld, 82 Wis. 539, (1892), where in an action for the contract price of threshing, a counterclaim was sustained for damages caused by the negligence of the plaintiff in permitting fire to escape from his threshing engine.

In actions on a contract the statute expressly allows counterclaims based on the same contract, or on disconnected contracts. But in other cases there is no provision for counterclaims except those arising out of the same transaction, etc., Walburger v. Koenig, 62 Wis. 558, (1885); Caldwell v. Ryan, 210 Mo. 17, (1908). See similar problem in the joinder of tort and contract claims in the complaint as arising out of the same transaction, etc. Craft Refrigerating Co. v. Brewing Co., 63 Conn. 551, ante p. 397.

transaction which is made the foundation of the plaintiff's claim. In this view of the case, it is immaterial what form of action is adopted by the plaintiff. As is said by Mr. Pomeroy in his treatise on remedies, "Whenever the facts are such that an election is given to the plaintiff to sue in form either for a tort or on contract, and if he sues on contract the defendant may counter-claim damages for the breach of that contract, the same counter-claim may also be interposed when the suit is in form for the tort; the facts being exactly the same in both phases of the action, the counter-claim would clearly arise out of the real transaction which was the foundation of the plaintiff's demand." § 788. Had the plaintiffs sued on the contract set up by the defendants, no possible objection could have been made to the defenadnts' counter-claim. The statute, in our opinion, preserves their right to set it up, although the plaintiffs have elected to sue for a conversion of the sacks, and not for a breach of the contract to return them. *Vide* McAdow v. Ross, 53 Mo. 199. The judgment will be reversed, and the cause remanded. The other judges concur.

DIETRICH v. KOCH.

Supreme Court of Wisconsin, 1874. 35 Wis. 618.

Action to vacate certain judgments on equitable grounds.

The defendants Emelie Koch and Bertha Lins answered jointly, admitting certain allegations not necessary to be stated, and denying all the other allegations contained in the complaint.

The answer then proceeds at great length (and this is the portion demurred to), to state many facts and circumstances upon which is predicated a counterclaim praying that the deed of May 9th, 1870, from Carl Dietrich to his son, the plaintiff, be set aside and adjudged void, and the property therein described distributed among the heirs of Carl Ditrich and his wife, the defendants who answer being two of such heirs. All of the averments of this portion of the answer relate exclusively to such counterclaim. For reasons which appear in the opinion it becomes unnecessary to set out such averments here.

The plaintiff demurred to that portion of the answer described

in the last preceding paragraph, on the ground that it did not state facts sufficient to constitute either a defense or a cause of action by way of counterclaim; and the defendants appealed from an order sustaining the demurrer.[1] * * *

LYON, J.: The plaintiff seeks by this action to procure the discharge of two certain judgments recovered against him in the year 1863, and he states in his complaint the facts which he claims entitle him to relief. The portion of the answer demurred to does not controvert the right of the plaintiff to have the judgment discharged. The allegations thereof relate exclusively to the invalidity of the deed of May 9th, 1870, which is the subject of the counter-claim contained in the answer. This portion of the answer is pleaded both as a defense and a counter-claim, and is demurred to as not stating a defense to the action or a good cause of action by way of counter-claim.

It is very clear that, as distinguished from a counter-claim, the portion of the answer demurred to fails to state facts constituting a defense to the action. Conceding, for the purposes of the case, that, were an action brought by the other heirs of Carl and Margarethe Deitrich against the plaintiff to annul the deed of May 9, 1870, the facts stated in the answer are sufficient to entitle the plaintiffs in such action to the relief demanded, we are brought to consider whether such cause of action is a proper counter-claim to this action. If it is not, the answer is demurrable; for a demurrer lies to an answer containing a counter-claim, when it appears upon its face that it does not constitute a counter-claim to the action. R. S., ch. 125, Sec. 16. (Tay. Stats. 1441.)

The term *counter-claim*, of itself, imports a claim opposed to, or which qualifies, or at least in some degree affects, the plaintiff's cause of action. It has been held in New York that a counter-claim, to be valid, must to some extent impair, affect or qualify the plaintiff's right to the relief to which he would otherwise be entitled by his action. In Matton v. Baker, 24 How. Pr. R. 329, the court says: "A counter-claim, to be available to a party, must afford to him protection in some way against the plaintiff's demand for judgment, either in whole or in part. It must, therefore, consist in a set-off or claim by way of recoup-

[1] Statement condensed and part of the opinion dealing with the sufficiency of the complaint omitted.

ment, or be in some way connected with the subject of the action stated in the complaint. It must present an *answer* to the plaintiff's demand for relief, must show that he is not entitled, according to law, or under the application of just principles of equity, to judgment in his favor, or to the extent claimed in the complaint." (P. 332.) See also Pattison v. Richards, 22 Barb. 143; and National Fire Ins. Co. v. McKay, 21 N. Y. 191. In the latter case, Judge Comstock uses the following language: "I apprehend that a counter-claim, when established, must in some way qualify or must defeat, the judgment to which a plaintiff is otherwise entitled." (P. 196.) That the New York courts have held correctly on this subject, we entertain no doubt whatever.[2]

We are unable to perceive that the counter-claim here interposed, if established, can qualify or in any manner affect the plaintiff's cause of action. Should the defendants succeed in proving that the deed of May 9, 1870, ought to be annulled, this fact, of itself, will not affect the plaintiff's cause of action. Upon proper proofs, he will still be entitled to have the judgments against him discharged. It necessarily follows that the cause of action stated in the answer is not available to the defendants as a counter-claim to this action. We conclude that the demurrer is well taken, whether the portion of the answer demurred to be regarded as a defense or a counter-claim, and this renders it unnecessary for us to determine whether, if the allegations of the answer are true, the deed in question ought to be cancelled in some proper proceeding for that purpose. * * *

Judgment affirmed.

SECTION 3. SEVERAL DEFENSES.

GARDNER v. CLARK.

Court of Appeals of New York, 1860. 21 N. Y. 399.

Appeal from the Supreme Court. Action by the assignee of one Adison Gardner for damages for the non-performance of a

[2] And so in Hillman v. Sommer- ville, 212 Mo. 415, (1908).

contract to sell and deliver a thousand bushels of barley, at forty-four cents per bushel. The barley was to be delivered at the store house of one Dunham, who was Gardner's agent for the purpose of receiving and paying for the same, and was to be paid for as fast as it should be delivered.

The defendant's answer set up, among other things, the delivery of a portion of the barley, and that the defendant had always been ready and willing to deliver the residue, according to the terms of the contract; but that Gardner was not ready or willing to receive or pay for the same, according to the terms of the contract. The evidence upon this point, and the decision of the judge at circuit founded thereon, are sufficiently stated in the following opinion.

For a further answer, the defendant averred that, in November, 1847, Adison Gardner, then being the sole person in interest in the contract and damages which are the subject of this suit, commenced an action in the Supreme Court against the defendant by writ of *capias ad respondendum,* commanding the sheriff to have the body of the defendant before &c., at, &c., to answer &c., in a plea therein mentioned; that the defendant was taken and held to answer; "and that, by said writ and taking of said Perkins Clark as aforesaid, a former suit and action at law was commenced by the said Adison ..... against the said defendant for and upon the same identical cause of action in this present action mentioned, and that the said former action is pending and not discontinued." Upon the trial the defendant offered proof in respect to such former action, making his offer in the same terms precisely as those of the answer. The judge, upon the objection of the plaintiff, rejected the evidence, holding that such former action was no defense, and that the defendant, having interposed a defense on the merits, waived his defense of the former action pending, and could not prove his offer. The defendant took exception. The charge and exceptions thereto are sufficiently stated in the following opinion. The jury found a verdict for the plaintiff, and the judgment entered thereon having been affirmed at general term in the fifth district, the defendant appealed to this court.

SELDEN, J.: It is quite certain that the judge at the circuit erred in supposing that, by including a defense upon the merits in the same answer with the defense of a former suit pending for the same cause of action, the defendant had waived[1] the latter

defense. A doubt at one time existed, whether the Code had abrogated the rule of the common law which required matters in abatement to be first pleaded and disposed of before pleading in bar to the action; and there were, in the Supreme Court, conflicting decisions upon the subject. The question, however, came before this court in the case of Sweet v. Tuttle (4 Kern. 465), where it was held that the Code provided for but a single answer, in which the defendant is required to include every defense upon which he relies to defeat the action. This decision must be considered as settling the question. The only serious inconvenience[2] suggested as likely to result from this construc-

[1] Where certain matters in abatement appear on the face of the pleading, they are waived unless objection is taken by demurrer, and such an objection can not be incorporated in an answer, Jones v. Foster, 67 Wis. 296, (1886); Depuy v. Strong, 3 Keyes, 603, (1867), ante p. 180.

[2] Daniel, J., in Sheppard v. Graves, 14 How. 505 (U. S. Sup. 1852), * * * "A striking illustration of the mischiefs flowing from the departure from the rules just stated, is seen in the practice attempted in the case before us. If it could be imagined that the plea to the jurisdiction and the plea to the merits, could be regularly committed to the jury at the same time, the verdict might involve the following absurdities. Should the finding be for the plaintiff, the judgment would, as to the defendant, be upon one issue, that of respondeas ouster, and upon the other, that he pay the debt, as to the justice of which he was commanded to answer over. Should the finding be for the defendant, the judgment upon one issue must be that the debt was not due, and upon the other, that the court called upon so to pronounce, had no authority over the case. So that in either aspect there must, under this proceeding, be made and determined one issue, which is incongruous with and immaterial to the other. A practice, thus fraught with confusion and perplexity, and one endangering the rights of suitors, it is exceedingly desirable should be reformed, and we are aware of no standard of reformation and improvement more safe and more convenient than that which is supplied by the time-tested rules of the common law. And by one of those rules, believed to be without an exception, it is ordained, that objections to the jurisdiction of the court, or to the competency of the parties, are matters pleadable in abatement only, and that if after such matters relied on, a defence be interposed in bar, and going to the merits of controversy, the grounds alleged in abatement become thereby immaterial, and are waived." * * *

In Supervisors v. Van Thelan, 45 Wis. 675, it was suggested that in order to avoid confusion the defence in abatement should be tried before the defence to the merits. Compare Corbett v. Casualty Co., 135 Wis. 505, (1908), to the effect that after a trial and

tion of the Code is that when an answer embraces both a defense in abatement and in bar, if the jury find a general verdict, it will be impossible to determine whether the judgment rendered upon the verdict should operate as a bar to another suit for the same cause of action or not.[3] It would, however, be the duty of the judge at the circuit, in such a case, to distinguish between the several defenses in submitting the cause to the jury, and require them to find separately upon them. In that way, it is probable that the confusion which might otherwise result may, in most cases, be avoided. At all events, the Code admits, I think, of no other construction.

The judge, therefore, was not justified in rejecting the evidence offered at the trial to show the pendency of a former suit for the same cause of action, upon the ground that this branch of defense had been waived by including in the answer a defense upon the merits.[4] If, however, for any other reason, the evidence was inadmissible, its exclusion should be sustained. The judge gave another reason for rejecting it, viz., that "such former action pending was no defense to this action." * * *

Judgment reversed.

DERBY v. GALLOP.

Supreme Court of Minnesota, 1860. 5 Minn. 119.

ATWATER, J.: Gallup brought an action of trover, in the district court of Ramsey County, against Derby & Day, for the taking and conversion of certain personal property, of which the plaintiff claimed ownership and possession. The complaint al-

adverse decision on the defence to the jurisdiction, the defendant waived that defence by going on with the trial on the merits.

[3] When the defence of pendency of another action has been established, the proper judgment is that the action abate, Conner v. Bk., 174 Cal. 400, (1917). At common law where a plea in abatement was held insufficient in law, the judgment was respondeat ouster, but when issue was taken on a plea in abatement and found for plaintiff, the judgment was quod recuperet, P. & R. Coal Co. v. Keever, 260 Fed. 534.

[4] Accord: Telephone Co. v. Beeler, 125 Ky. 366; Johnson v. Detrick, 152 Mo. 243; Hurlburt v Palmer, 39 Neb. 158.

leged the value of the property to be $2,636, and that the plaintiff had sustained special damages to the amount of one thousand dollars, asking judgment for value and damages.

The answer contained, first, a general and specific denial of each and every allegation in the complaint. Second, for a further defense, the answer alleges, that the defendants were creditors of one C. W. Griggs, and sued out a writ of attachment against him in the United States District Court; that by virtue of said writ, and under the direction of the plaintiffs therein, the marshal of the court did, on the 15th of August, 1859, levy upon certain goods, and take the same into his possession, etc.; that said goods were taken from his possession by the plaintiff by force; and that, on the 18th of August, he levied on certain goods described in the answer; which takings are alleged to be the same as those charged in the complaint. There was a verdict for the plaintiff, on which judgment was entered and motion made to set aside the same, which was denied. Defendants appeal from the order denying the motion and judgment.

The first question presented is, as to the admissibility of the two separate defenses set up in the answer. The judge charged the jury that the taking was admitted by the pleadings, to which the defendants excepted. If both defenses can stand, it is evident the charge was erroneous, otherwise, it was correct. These pleas are clearly inconsistent with each other. Under the old system of pleading, cases may be found where analogous pleas have been sustained. In Shuter v. Page, 11 Johns 196, *non cepit,* and property in the defendant was pleaded in action of replevin. The pleas were sustained—the court, in its opinion, not deciding the pleas were not inconsistent, but stating that "courts have allowed pleas, in many instances, apparently as inconsistent as those in the present case." Even under the old system of pleading, it is difficult to perceive how such a plea could be sustained. But the cases in which similar pleas have been sustained have arisen under statutes (so far as we have examined) similar to that of 4 Anne 16, § 4, which provides that "it shall be lawful for any defendant or tenant, in any action or suit, or for any plaintiff in replevin, in any court of record, with leave of the court, to plead as many several matters thereto as he shall think necessary for his defense." The code does not authorize such pleading, nor any fictitious pleading; and the decision of this question must depend upon the construction to be

given to the provisions of the code on the subject of pleading.

The authorities under the code upon this point are conflicting. Among those sustaining the principle here contended for, see Lansing v. Parker, 9 How. Pr. R. 288; Hollenbeck v. Clow, id. 289; Hackley et al. v. Ogmun, 10 How. Pr. 44; Stiles v. Comstock, 9 How. Pr. R. 48; and *contra*, Roe v. Rogers, 8 How. Pr. R. 356; Arnold v. Dimon, 4 Sandf. 680; Schneider v. Schultz, id. 664; Lewis v. Kendall, 6 How. Pr. R. 59; Ormsby v. Douglas, 2 Abb. Pr. R. 407. It is not difficult to understand how these contradictory decisions have occurred under the code. They are the result, on the one hand, of a desire to adapt the former system of pleading to the provisions of the code, and to recognize the binding force of authorities under that system; and, on the other, to make the present system of pleading conform to the provisions of the code in its spirit, as well as letter, ignoring, if need be, to effect this object, decisions which might have weight under the former system. And I cannot but here remark, that had there been a disposition manifested by all the courts, in the states where the code has been adopted, to co-operate in giving full force and effect to the changes introduced by it, instead of adhering with such pertinacity to the former system, and hampering the new with restrictions contrary to its manifest intent, the code would have become more effective in the administration of justice, or, at least, its merits and demerits would have been more satisfactorily tested. It may still be an open question whether the system embraced in the code shall prove more successful in eliminating truth from error than that which formerly obtained, but so long as it prevails, it should be administered by the courts in accordance with its letter and spirit, and so as to carry out, as far as practicable, the intent of its framers.

Referring, then, to the code, we find that one of the most important changes effected by it, is the abolition of all fictitious pleading, and requiring facts to be stated, whether as constituting the cause of action, or ground of defense. In regard to the complaint, the principle is stated in direct terms, the plaintiff being required to state "the *facts* constituting the cause of action;" and, although the language in regard to the answer is not precisely the same, yet it is entirely clear that the intent of the code is to allow the defendant to plead only the facts constituting his ground of defense. For it is not to be supposed that any advantage is to be given to the defendant over the plaintiff

in pleading, and the answer is required to be verified whenever the complaint is. The paramount object of the change effected by the code is to require truth in pleading. If this could be completely attained much of the cumbrous machinery of courts could be dispensed with, jury trials would no longer be necessary, and nothing would be required save the application of principles of law to the facts stated. But, if absolute truth in pleading be unattainable, courts may at least prevent parties from spreading upon the record pleas which prove their own falsity, or from deriving advantage from such as are inconsistent with themselves. It is true the code provides that "the defendant may set forth by answer as many defenses as he shall have;" but this provision must be understood with the restriction that those defenses must be true—that they must be such as the facts to be proved will sustain. The object of the provision is not to enable the defendant to defeat the action at all hazards, but to afford him the opportunity of pleading such facts as actually exist, or can be proved, constituting a defense. To hold otherwise would be in direct conflict with the manifest intent of this system of pleading, and lead to the most serious abuses.

In the case at bar, the defendants have denied, in the first place, every allegation of the complaint, thus putting in issue both the right of property in the plaintiff, and the taking of the goods by the defendant. This plea, if true, constitutes a perfect defense to the action. The taking of the goods constituted the gist of the action, and from the nature of the case, the defendants must know whether the plea denying the taking was true or false. If true, no other defense was necessary, and even had another or others existed, consistent with this, it would have but encumbered the record with useless issues to plead them, though in such case permissible. But the defendants, in their second plea, expressly admit the taking the goods, alleging them to belong to one Griggs, and justify the taking under process. The only part of this plea, inconsistent with the former, is that in relation to the taking of the property. The allegation that the property belonged to Griggs, and that in regard to the value, are not in conflict with the previous denials. But in regard to the taking, it is obviously impossible that both pleas should be true, and no process of legitimate reasoning can make them appear consistent. If the same weight is to be allowed to the admission,

as to the denial, of the taking, it leaves them equally balanced, or, rather, the one would destroy the other, leaving the charge in the complaint undenied. But, in fact, the admission of the taking is entitled to more weight than the denial, for it is a familiar rule of pleading, that each party's pleading is to be taken most strongly against himself, and most favorably to his adversary. And thus, I think, the plaintiff is entitled to the benefit of the admission of the taking, as the pleas stand, and that there is no necessity for a motion to strike out, or to compel the party to elect by which he will abide.

The reasoning by which, in the cases above cited, similar pleas have been sustained, is to my mind entirely unsatisfactory, and ignores the true principles of pleading, as established by the code. The learned justice (Shankland) who delivered the opinion in Stiles v. Comstock, has made an able plea for the defendant, and showed, perhaps, that the principle there contended for was recognized under the old system, though his argument seems entirely to overlook the idea that truth is essential to a pleading under the code. He supposes that the plaintiff may *prove* a cause of action which never actually existed, and that the defendant should be permitted to frame his plea to meet such supposable case, and also to deny the actual existence of the fact alleged. It is, perhaps, sufficient to remark, that general rules of pleading cannot be framed to meet these extreme and exceptional cases; and that, although a case might be supposed where a defendant would suffer injury by the commission of perjury against him, the evil would be far greater to allow him to deny an actual fact, and yet to derive the same advantage from a plea admitting the existence of the fact. I cannot perceive upon what principle this rule of pleading can obtain, unless it be held that the code was designed to furnish the defendant with the means of defeating his adversary, *per fas aut nefas*. We have to some extent recognized the rule here adopted, in Mason & Craig v. Heyward, 3 Minn. (182), and Bergfield v. McClung, etc., 4 Minn. (148). * * *

Judgment affirmed.

BUHNE v. CORBETT.

Supreme Court of California, 1872. 43 Cal. 264.

By the Court, WALLACE, C. J.:

This action was brought to recover the possession of a tract of land situate in the County of Humboldt. The pleadings are verified. The complaint alleges that the plaintiff is the owner in fee of the premises which are described, and that the defendants "on the 2nd day of February, 1870, entered into the possession of the demanded premises above described, and have ever since and still do unlawfully withhold the possession thereof from the plaintiff," etc., concluding with the usual prayer for judgment. The answer is as follows:

"Now comes Joseph Corbett, John Doe (Walter Cutler), and Richard Roe (E. H. Pinney), defendants in the above entitled action, and answering the complaint of the plaintiff herein, on their information and belief deny that on the 1st day of February, 1870, or at any other time, the plaintiff was, or now is, or ever has been, the owner of, or seized in fee, or entitled to the possession of the tract of land described in said complaint, or any part thereof; and deny that on said day, or any other time, the defendants entered into the possession of the same, or any part thereof, or that they ever withheld, or now withhold the possession of the same, or any part thereof, from the plaintiff. Further answering, the said defendants aver that from the year A. D. 1848, down to the 23rd day of May, A. D. 1867, inclusive, the tract of land described in the plaintiff's complaint, was public land of and belonging to the United States, and that on the day last named, and prior thereto, by orders of the President of the United States, one bearing date of that day and another thereto, and in due course of law, the said lands, and the whole thereof, was reserved to the United States for lighthouse purposes, and from thence hitherto have remained, and still do remain so reserved for the purposes aforesaid; and that during all of said time, from the year 1848 hitherto, the United States has been and still is the owner in fee and seized of said land and every part thereof.

"That from the 23rd day of May, 1867, hitherto, the United States has continuously occupied and possessed said lands for lighthouse purposes aforesaid, and has erected a lighthouse and

light, and other improvements thereon, for the protection and safety of ships and other vessels navigating the waters of the Pacific Ocean, at an expense of about one hundred thousand dollars.

"That the said defendants are the keepers of the light and lighthouse aforesaid, employed for that purpose by the said United States, at stipulated wages, and that they are, as such keepers, the mere servants and employes of the said United States, subject at any and all times to the orders, directions, and commands of the said United States and certain of the officers thereof, and to be discharged and removed from such service and employment.

"That as such lighthouse keepers, and under and in obedience to the orders, directions, and commands of the said United States and officers, these defendants, as such servants and employes for the year last passed, have been and still are in the temporary charge of the light and lighthouse buildings on said land for the sole purpose of keeping the light burning at proper times, and keeping the said lighthouse building in proper repair, all in performance of and in obedience to the duties of keepers as aforesaid, as the same are regulated and prescribed by the said United States and officers.

"The said defendants further aver that they do not now nor have they ever claimed or had any interest in said land or improvements, or any part thereof; and that from the time of the reservation aforesaid the United States by and through these defendants and other of its servants and employes, has continually been and still is in the sole and exclusive possession and occupation of the said land and improvements, and every part thereof.

"Wherefore the defendants pray that they be hence dismissed, and that they may have judgment against the plaintiff for costs of suit."

At the trial, the plaintiff offered no evidence whatever touching the alleged fact of the possession of the defendants, and, on motion of the defendants, a judgment of non-suit was rendered, on the ground "that the plaintiff has not shown the defendants to have been in the possession of the said premises at the commencement of this action, or at any other time;" and from that judgment this appeal is brought.

We are of opinion that the non-suit was correct upon the pleadings.

The Practice Act (Sec. 49) provides as follows: "The defendant may set forth by answer as many defenses and counterclaims as he may have. They shall each be separately stated, and the several defenses shall refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished."

It will be observed that the answer here, in the first defense set forth, distinctly denies, "that on said day, or any other time, the defendants entered into the possession of the same, or any part thereof, or that they ever withheld, or now withhold, the possession of the same, or any part thereof, from the plaintiff;" and while it is possible that, under strict rules applicable to verified answers, an objection might have been made to the sufficiency of this denial in a single particular, none such was, in fact, made below, nor has any been pointed out here.

After this denial, the defendants, "further answering," make certain affirmative averments, in the course of which they set up that they are in charge of the lighthouse on the premises as the employes of the United States, etc.; and it is upon the effect of these averments in pleading that we understand the plaintiff to claim that he was relieved from the necessity of proving that the defendants were in possession at the time the action was commenced.

1. Assuming that the defenses, as thus pleaded, were inconsistent upon the point of the possession of the defendants, it would not follow that the plaintiff would be at liberty to disregard them, or either of them, at the trial. If he desired to present that question, he should have moved to strike out the one or the other, or applied for an order compelling the defendants to elect as to which particular one of them they would rely upon. (Klink v. Cohen, 13 Cal. 623; Uridias v. Morrill, 25 Cal. 31.)

2. But even had he by motion presented the question of the supposed inconsistency of the several defenses in the answer, we think that it would not have availed him. A party defendant in pleading may plead as many defenses as he may have. If a plea or defense separately pleaded in an answer contain several matters, these should not be repugnant[5] or inconsistent in them-

[5] Berry, J., in Cook v. Finch, 19 Minn. 407: * * * "Defendants set up in their answer that the contract, upon which the plaintiffs

selves. But the plea or defense regarded as an entirety, if it be otherwise sufficient in point of form and substance, is not to be defeated or disregarded merely because it is inconsistent with some other plea or defense pleaded.[6] And there is no distinction in this respect between pleadings verified and pleadings unverified. (Bell v. Brown, 22 Cal. 672; Wilton v. Cleveland, 30 Cal. 192.)

We are, therefore, of opinion that the judgment must be affirmed, and it is so ordered.

RHINE v. MONTGOMERY.

Supreme Court of Missouri, 1872. 50 Mo. 566.

ADAMS, JUDGE, delivered the opinion of the court:

This was an action for assault and battery. The answer sets up three separate defenses: First, a denial of the assault and battery; second, that the plaintiff made the first assault, which was repelled by the defendant in self-defense; third, that the defendant was in his own dwelling, and the plaintiff was unlawfully there, and refused to leave, and he used sufficient force to put him out, and only such force as was necessary. The record does not show that any replication was filed to the second and third defenses.

The jury found a verdict for the plaintiff, and a motion for a new trial was made and overruled. The court, at the instance of the plaintiff, and against the objections of the defendant, gave several instructions to the jury. But we are only called upon to examine the first instruction, which reads as follows:

"The defendant's answer admits the assault and battery upon the plaintiff, with all the aggravated injuries to plaintiff, as

complain, was "revoked, annulled, and modified." As the contract could not be revoked, and annulled, and also modified, the defences thus set up were inconsistent, and we see no reason why defendants were not properly compelled to elect, upon which they would stand. Conway v. Wharton, 13 Minn. 160 (Gil. 145)." * * *

[6] And so in U. S. Vinegar Co. v. Schlegel, 143 N. Y. 537, (1894), denial of plaintiff's incorporation joined with a plea that it was incorporated for an illegal purpose.

charged by plaintiff in his petition; and unless the jury shall believe from the evidence in the cause that the defendant was either excusable or justifiable in making such assault and battery, they will find for the plaintiff, and assess to him such damages against the defendant as under all the circumstances they may think proper, not exceeding $2,000; and in estimating the damages they may take into consideration the pain, sufferings, and mental anguish and wounded feelings of the plaintiff in consequence of such assault and battery."

Under the pleadings as they stand here, it is difficult to perceive upon what principle this instruction was allowed. It asserts that plaintiff's entire case was admitted by the answer, and under it, all the plaintiff was bound to do was to read his petition to the jury and rest. The court may have acted on the mistaken theory that the positive denial of the trespass was waived by the subsequent supposed additions of the pleas of justification. Our present code of practice, like the old system of pleading, permits several consistent defenses to be set up in the same answer. The only question, therefore, is whether these defenses were consistent with each other. The three defenses amounted in substance to the old pleas of *not guilty—son assault demesne,* and *mollitur manus imposuit.*

The trespass complained of is an unlawful battery. The defendant's first defense is a denial of the alleged trespass. The second and third defenses are justifications of the defendant's acts, and are in no sense express or implied admissions that they were unlawful. The three defenses are clearly consistent, both at common law and under our statute. (Nelson v. Brodhack, 44 Mo. 596; Lansing v. Parker, 9 How. Pr. 288.)

But there were no replications to the new matter contained in the defendant's pleas of justification, and under our statute all the material allegations of new matter not controverted by the reply are, for the purposes of the action, to be taken as true. (Wagn. Stat. 1019, § 36.) The instruction referred to erroneously assumed that the new matter had been controverted by the reply. This was obviously a mere oversight, and the replies were, no doubt, unintentionally omitted, and may be supplied at any time by permission of the court before trial.

Judgment reversed and the cause remanded. The other judges concur.

SOUTH MILWAUKEE CO. v. HARTE.

Supreme Court of Wisconsin, 1897. 95 Wis. 592.

This is an action to recover the second instalment upon a land contract. On the 12th day of December, 1892, the plaintiff company entered into a written contract with the defendant to sell him a certain lot of land in the village of South Milwaukee for the sum of $375, to be paid in four equal annual instalments; the first instalment to be paid at the date of the contract and others annually thereafter, with interest on the deferred payments. The defendant made the first payment of $93.75 at the date of the contract, but refused to make the second payment, which fell due December 12th, 1893, and also refused to pay the taxes upon the lot for the year 1893, which by the agreement he was required to pay. Upon this refusal this action was brought to recover such second payment, with the amount of such taxes, with interest. The complaint is in appropriate form for the recovery of said sums. The answer sets up as a defense that the land contract was obtained by false and fraudulent representations to the effect that an adjoining block had been purchased and paid for in full by Frederick Pabst, who had agreed to build certain extensive buildings thereon in the following spring, and, further, that the plaintiff had entered into a bond to the county of Milwaukee to grade, gravel, and sidewalk the street upon which the lot was situated prior to May 1, 1895. The answer further alleged that the defendant had rescinded the contract. The answer also contained two counterclaims: First, a counterclaim to recover $93.75, paid at the date of the contract, with interest, on the ground that the contract was induced by false and fraudulent representations, and had been rescinded; and, second, a counterclaim to recover damages for breach of the contract, by reason of the failure of the plaintiff to grade, gravel, and sidewalk the street. The plaintiff, by his reply, alleged that the defendant, by his second counterclaim, waived any and all rights he may have had to rescind the contract, and that by such second counterclaim he had affirmed and ratified said contract. Further replying, the plaintiff admitted that the grading, graveling, and laying of sidewalks upon said street had not been completed, but alleged

that the work was progressing, and would be completed as fast as necessity existed.

Upon the trial the plaintiff demurred, *ore tenus*, to the answer and counterclaims, which being overruled, the plaintiff moved to strike out the defense because it was inconsistent with the counterclaims, and further moved that the second counterclaim be stricken out as inconsistent with the first counterclaim, all of which were denied by the court, and exception taken. The plaintiff also objected to the submission of any evidence on the first counterclaim, on the ground that the defendant was estopped by the admission of the second counterclaim, which objection was also overruled. The trial resulted in a verdict for the defendant, assessing his damages on the first counterclaim at $134.35, being the amount of the first payment with interest thereon from the time of the alleged rescission of the contract. From the judgment upon the verdict the plaintiff appealed.

WINSLOW, J.—The appellant's first contention is that the second counterclaim is inconsistent with the defense and with the first counterclaim, and that the demurrers to the defense and first counterclaim should have been sustained, and no evidence received under them, on account of such inconsistency. This contention must fail. It is well settled that the defendant may plead as many defenses and counterclaims as he has although they may be based on inconsistent legal theories. R. S. sec. 2657; Bruce v. Burr, 67 N. Y. 237; Pomeroy, Code Rem. (3d ed.) § 722, and authorities cited in note; Maxwell, Code Pl. 396, 397. This rule does not invade the general principle that the truth should be pleaded, nor the principle that an admission in an answer will not be affected by a repugnant denial in another part of the same answer. Hartwell v. Page, 14 Wis. 49. While authorities may be found stating, in general terms, that inconsistent defenses cannot be set up in the same answer, examination will show that these are generally cases where repugnant allegations of fact are contained in the different defenses, and where, consequently, the proof of one defense would necessarily disprove the other. There are in the present case no repugnant nor contradictory statements of fact. Indeed, the facts alleged in the defense and in the counterclaims are perfectly consistent and harmonious. The only object of the second counterclaim is to obtain damages for breach of the contract,

should it be held that it was binding, and that there was no fraud. This, we hold, may properly be joined with a defense or counterclaim to avoid the contract on the ground of fraud.
* * *

Judgment affirmed.

LEAVENWORTH L. & H. CO. v. WALLER.

Supreme Court of Kansas, 1902. 65 Kan. 514.

Plaintiff's action was for damages done by the burning of her barn. The petition charged "that the defendant, its officers and agents, thereunto duly authorized and empowered, entered into and contracted with said plaintiff, whereby the said defendant was to put and place lights in said barn for the use of the plaintiff;" that, in putting in the necessary wires, the same were not large enough, nor properly insulated, and were placed carelessly and negligently, so that the injury of which she complains resulted. The answer was first a general denial, "and, for a second and further ground of defense herein, defendant refers to the foregoing part of this answer as part hereof,[7] and further avers that if plaintiff was in any wise damaged or injured as set forth in the petition, which this defendant denies, then the defendant avers that the plaintiff and her agents, by her duly appointed and authorized, so acted and conducted themselves as to contribute to the damage and injury complained of." For reply, the plaintiff filed a general denial. Upon these issues a trial was had, which resulted in a verdict and judgment for the defendant. From it error was prosecuted to the court of appeals, Northern department, Eastern division, where the same was reversed, and the case remanded for further trial. See Waller v. Heating Co., 9 Kan. App. 301 (61 Pac. 327). A second trial was had upon the same pleadings. The defendant then sought to show by competent evidence that it was not the owner of the electric light plant operating the lights in plaintiff's barn at the time the fire occurred, but that another and

7 That a denial should not be incorporated in the statement of another defence, see Carter v. Bk., 67 N. Y. S. 300, (1900).

separate corporation, from which plaintiff subsequently purchased, was at that time the owner. This evidence was rejected by the court upon the objection of the plaintiff. * * *

Cunningham, J.: * * * The reasons urged for the exclusion of the evidence are: First, that the same was irrelevant and immaterial, because not within the issues in this case; second, that when the case was in the appellate court, defendant's attorneys admitted in their brief filed in that proceeding in error that the defendant was the owner of the electric lighting plant at the time of the fire.

In support of the first contention, it is urged, first, that the plea of contributory negligence contained in defendant's second defense was in effect an admission that defendant caused the damage complained of; that to deny defendant's negligence is inconsistent with the plea of contributory negligence on the part of the plaintiff; that there could be no contributory negligence on the part of the plaintiff without the antecedent negligence on the part of the defendant. In the language of the defendant in error, "The plea of contributory negligence is in the nature of a plea of confession and avoidance, and if this be true, then the defendant is estopped from denying its identity as the party properly sued." This raises a novel and important question in our practice. It will be observed that the defendant's answer contained a general denial. This, standing alone, would have put the plaintiff upon proof of all of the material allegations in her petition. One of these allegations was that the defendant's negligence was the cause of her injury. She was thereby required to establish not only negligence, but to connect the defendant with such negligence by showing its ownership of the electric light plant at the time of the injury. Railway Co. v. Searle, 11 Colo. 1 (16 Pac. 328); Jackson v. Water Co., 14 Cal. 19; Schular v. Railroad Co., 38 Barb. 653; Greenway v. James, 34 Mo. 328. This she sought to do in making her case, by introducing evidence that the defendant was the owner of the electric light plant at that time. This denial, standing alone, would not only require this proof at the hands of the plaintiff, but, *per contra,* permit the defendant to disprove this material matter. Davis v. McCrocklin, 34 Kan. 218 (8 Pac. 196). It will be further observed that the defendant, in its second defense, while still denying generally, says that, if the plaintiff was damaged, then such damage was occasioned by the contributory negligence

of the plaintiff or her agents. We do not think this claim inconsistent with the claim that the injury was not committed by the defendant, or occurred through his negligence. The defendant in error cites various authorities in support of her claim. They are strongly stated in a citation from 5 Encyc. Pl. & Pr., pp. 11, 12, as follows: "The plea of contributory negligence is a plea in confession and avoidance, which admits negligence on the part of the defendant, but seeks to avoid liability therefor by alleging that plaintiff was guilty of negligence which contributed to his injury." We are not ready to grant that the authorities cited fairly support the law as thus laid down, though *obiter* remarks contained in some of them probably do. However, immediately following this quotation is the statement: "But this is not the rule in those states whose codes permit the defendant to set up as many defenses, whether of law or of fact, as he may see fit." Our statute (section 4528, Gen. Stat. 1901) permits the defendant to "set forth in his answer as many grounds of defense, * * * as he may have, whether they be such as have been heretofore denominated as legal or equitable, or both." Notwithstanding this provision, the pleader may not rely in the same plea upon absolutely inconsistent defenses. He can not admit and deny in the same breath. He may, however, adapt his pleadings so as to meet the possible conditions and contingencies of the case that his opponent may prove. He may say: "I was not negligent. I am wholly innocent in that matter. It is possible, however, that you may be able by your indirection or my misfortune to satisfy the jury that I am at fault. If you do, I shall assert that the injury was occasioned through your contributory negligence." Or, he may say, "If there was negligence which was the cause of your injury, I was not its author," and at the same time say, "If you were injured by the negligence of any one, you are not entitled to relief, for you contributed thereto by your negligence." It certainly would be a very great hardship to a defendant who knows that he was not negligent, and knows that the plaintiff was, to compel him, at his peril, to elect which of these defenses, equally good, he should adopt. These defenses are not inconsistent.[8] The truth of either by no means implies

[8] And so in case of a general denial and assumption of risk, semble. Adair v. Ry., 282 Mo. 133, (1919),

the falsity of the other. They may be availed of for the purpose of presenting the exact facts in a given case. Beyond question, a defendant might take advantage of plaintiff's contributory negligence, should such be developed in the making of plaintiff's case, even though the defendant had pleaded nothing but the general denial. It would be a queer rule that would deprive him of this, had he added to such general denial a plea of contributory negligence. The plea of contributory negligence, standing alone, would be one in avoidance, but it cannot be said to be one in confession, where accompanied by a general denial. In Railroad Co. v. Hall, 87 Ala. 708 (6 South. 277, 4 L. R. A. 710, 13 Am. St. Rep. 84), on page 724, 87 Ala., and page 284, 6 South., the law is announced as follows: "A denial of the negligence charged, or plea of not guilty, although pleaded separately, repels all presumption of confession which arises from the plea of contributory negligence when pleaded alone." In Cole v. Woodson, 32 Kan. 272 (4 Pac. 321), which was an action for slander, where defendant had denied, and also pleaded the truth of the slanderous words, this court said (page 276, 32 Kan. and page 322, 4 Pac.): "It would certainly be a great hardship to a defendant who had been sued for slander to be required to admit that he had used the alleged slanderous words, when in fact he may never have used them, in order that he may be allowed to show that such words are true. And it would equally be a great hardship to him to be required, in effect, to admit that the words are false and slanderous, when in fact they may be true, in order to be allowed to make the defense that he never used such words. Our statutes do not tolerate any such unjust rules, but allow a defendanut to set forth as many defenses as he may have, which in slander cases may be that he did not use the words charged, and also that the words are true. And it makes no difference what the common law may have been, or what may have been decided by courts in other states, where their statutes are different from the statutes of Kansas. The statutes of Kansas must govern in actions originating and instituted within the borders of Kansas. And where they are clear and explicit, we need not look any further." In Bell v. Brown, 22 Cal. 671, on page 678, the court, commenting upon the provisions of a statute like our own, upon a right it gives a defendant to set up all his defenses, says: "It is an absolute right given him by law, and the prin-

ciple is as old as the common law itself. He may fail to prove one defense, by reason of the loss of papers, absence, death, or want of recollection of a witness, and yet he ought not thereby to be precluded from proving another equally sufficient to defeat the action." In Treadway v. Railroad Co., 40 Iowa 526, the law is laid down in the syllabus: "An admission in the nature of a confession and avoidance in one count of an answer does not operate to admit matter formerly denied in other counts."

In Weaver v. Carnahan, 37 Ohio St. 363, a defendant, when sued, to recover the value of services rendered, may deny that the services were rendered, and also allege that, if rendered their value was less than the amount claimed. For cases holding analogous views, see 1 Enc. Pl. & Prac. 857. * * *

Judgment reversed.

McALPINE v. FIDELITY & CASUALTY CO.

Supreme Court of Minnesota, 1916. 134 Minn. 192.

DIBELL, C. Action on a policy of accident insurance on the life of John McAlpine in which his wife, the plaintiff, was the beneficiary. There was a verdict for the defendant. The court granted the plaintiff's motion for a new trial. The defendant appeals from the order granting it. * * *

The plaintiff claimed in her complaint that the death of McAlpine resulted from accidental means. To recover it was necessary to prove it. McAlpine was found dead in the basement of his home between 3 and 4 o'clock in the morning of August 15, 1913, with a fatal bullet wound in his head. His revolver was close by with one chamber empty. The circumstances were not conclusive. As between accident and suicide the presumption favored accident. The defendant alleged suicide and alleged further that the death of the insured was caused by the beneficiary. In either event the plaintiff could not recover. At the opening of the case the plaintiff moved that the defendant be required to elect on which it would rely upon the ground that the two were inconsistent. This motion was denied and the plaintiff claims that it was error justifying the order granting the new trial. Our statute is as follows:

"The defendant may set forth by answer as many defenses and counterclaims as he has. They shall be separately stated, and so framed as to show the cause of action to which each is intended to be opposed." R. L. 1905, § 4132 (G. S. 1913, § 7758).

Under our decisions separate defenses must be consistent. This is not an express requirement of the statute. It has come about by construction. It is not a universal holding, nor where held is the principle uniformly applied. See Abbot's Civ. Jur. Tr. (3d Ed.) 119; Pomeroy, Code Remedies (4th Ed.) § 598; Bliss, Code Pl. §§ 342-344; Phillips, Code Pl. §§ 261-266; 2 Estee Pl. § 3381; 1 Enc. Pl. & Pr. 852-860; note, 48 L. R. A. 177, 16 Dec. Dig. Pl. § 93; 39 Cent. Dig. Pl. § 189. The objection upon the ground of inconsistency is not favored. Rees v. Storms, 101 Minn. 381, 112 N. W. 419. The purpose of the code system of pleading is to get the parties to a speedy trial upon the merits. It is not to prevent the hearing of a cause of action or the interposition of a defense. We are not so much concerned with the development of an artistic and symmetrical system of pleading as we are with having a practical procedure which will result in a speedy determination of disputes upon the facts. It is sometimes said that whether both defenses can be true is the test of their consistency. An examination of the cases shows that whatever the test, defenses are not often held inconsistent. Thus it is held not inconsistent to deny a slander and allege matter in mitigation. Warner v. Lockerby, 31 Minn. 421, 18 N. W. 145, 821. Or to deny the rendition of services by the plaintiff and allege payment. Steenerson v. Waterbury, 52 Minn. 211, 53 N. W. 1146. Or to deny the execution of a note and allege that it was procured by fraud. Bank of Glencoe v. Cain, 89 Minn. 473, 95 N. W. 308. Such defenses in general amount to a general denial coupled with a plea in confession and avoidance. There is an inconsistency in fact between a general denial and a plea in confession and avoidance; but the inconsistency does not prevent the interposition of both. When the rule of consistency, technically applied, prevents the interposition of a fair defense, it must yield to the insistent demand of the law that a party be given a hearing on all his causes of action and all his defenses. This is the paramount consideration. Substantive rights must not be sacrificed to preserve a rule no more important and no better accredited than the con-

sistency rule. Naturally enough the legal mind revolts at a rule of pleading which requires a defendant to choose which of two honest defenses he will interpose, though both cannot be true, and neither is within his knowledge, at the peril of losing all if he mistakes, for when called upon to elect he is having his final day in court. We share the view of the trial court that the situation was not one requiring an election which it expressed as follows:

"It is true that the two defenses cannot both be true or correct; but it is also true that the defendants do not very well know which one may be correct; and either would be a good defense if true. * * * It would be an injustice to limit them to one when they cannot know which one, if either, is true. They should have an opportunity some time to rely upon the other, and we cannot have two trials of the same matter. Therefore the motion to elect should be denied."[9] * * *

Order reversed.

[9] Accord: Cole v. Woodson, 32 Kan. 272, (1884), general denial and plea of truth; Woodson v. Williams, 204 S. W. 183, (Mo. Sup. 1918), general denial and plea in mitigation. Compare Baker v. Clark, 186 Ky. 816, (1920), that in an action for libel, a plea of privilege cannot stand with a denial of publication.

For an extensive collection of the cases, see comment on the principal case in 10 California Law Review, 251.

CHAPTER VI.

THE REPLY.

Code of Civil Procedure of New York.

§ 514.[1] Where the answer contains a counterclaim, the

[1] The Codes fall into three groups on the subject of a reply. 1st, Those which do not provide for any reply, viz., California and Idaho. 2nd, Those substantially following the New York Code, viz. Arizona, R. S., 1913, § 428. Arkansas, Dig. Stat., 1921, §§ 1205, 1206. New York Civ. Prac. Act, 1920, § 272, amended:

Where the answer contains a counterclaim, the plaintiff may reply to the counterclaim. The reply must contain a general or specific denial of each material allegation of the counterclaim controverted by the plaintiff, or of any knowledge or information thereof sufficient to form a belief; and it may set forth new matter not inconsistent with the complaint constituting a defense to the counterclaim. A reply may contain two or more distinct avoidances of the same defense or counterclaim.

North Carolina, Consol. Stat., 1919, § 523. North Dakota, Comp. Laws, 1913, § 7452; South Carolina, Code, 1912, § 203; South Dakota, Rev. Code, 1919, § 2357; Wisconsin, Stat., 1919, § 2661; United States, Equity Rules, 1912, No. 31:

"Unless the answer assert a set-off or counterclaim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff. If the answer include a set-off or counterclaim, the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counterclaim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply. In default of a reply, a decree pro confesso on the counterclaim may be entered as in default of an answer to the bill."

3rd, Those requiring a reply where the answer contains new matter constituting a defence or counterclaim, and in the main substantially following the wording of the Missouri Code, R. S. 1919, § 1235:

plaintiff, if he does not demur, may reply to the counterclaim.[2] The reply must contain a general or specific denial of each material allegation of the counter-claim, controverted by the plaintiff, or of any knowledge or information thereof sufficient to form a belief; and it may set forth in ordinary and concise language, without repetition, new matter not inconsistent with the complaint, constituting a defense to the counter-claim.

§ 515. If the plaintiff fails to reply or demur to the counter-claim, the defendant may apply, upon notice, for judgment thereupon; and, if the case requires it, a reference may be ordered, or a writ of inquiry may be issued, as prescribed in chapter eleventh of this act, where the plaintiff applies for judgment.

§ 516. Where an answer contains new matter, constituting a defense by way of avoidance, the court may, in its discretion,[3] on the defendant's application, direct the plaintiff to reply to the new matter. In that case, the reply, and the proceedings

The plaintiff may demur to one or more defenses set up in the answer, stating in his demurrer the grounds thereof; and where the answer contains new matter, the plaintiff shall reply to such new matter within such time as the court by rule or otherwise shall require, denying generally or specifically the allegations controverted by him, or any knowledge or information thereof, sufficient to form a belief, and he may allege in ordinary and concise language and without repetition any new matter not inconsistent with the petition, constituting a defense to the new matter in the answer. To this reply the defendant may demur within three days after the same has been filed.

Alaska, Code, 1900, § 67; Connecticut, R. S., 1918, § 5633; Indiana, Burn's Ann. Stat., 1914, § 363; Iowa, Comp. Code, 1919, §§ 7219, 7220; Kansas, G. S., 1915, § 6996; Kentucky, Rev. Code, 1900, § 98; Minnesota, G. S., 1913, § 7760; Missouri, R. S., 1919, § 1235; Montana, Rev. Code, 1907, § 6560; Nebraska, Ann. Stat., 1911, § 1111; Nevada, Rev. Laws, 1912, § 5057; New Mexico, Ann. Stat., 1915, § 4119; Ohio, Gen. Code, 1921, § 11326; Oklahoma, Rev. Laws, 1910, § 4753; Oregon, Laws, 1920, § 77; Utah, Comp. Laws, 1917, § 6590; Washington, Rem. & Bal. Code, 1910, § 276; Wyoming, Comp. Stat., 1920, § 5669.

[2] Since a counterclaim is a cause of action in favor of the defendant against the plaintiff, ante p. 470, the reply under sec. 514 is not a true reply at all, but rather an answer, governed by the same rules as an answer to a complaint.

[3] For a discussion of the considerations which will induce a court to make an order on the plaintiff to file a reply under this section, see Hubbell v. Fowler, 1 Abbott, Prac. N. S. 1; Hungarian Credit Bank v. Titus, 175 App. Div. 504, (1916).

upon failure to reply, are subject to the same rules as in the case of a counter-claim.

§ 517. A reply may contain two or more distinct avoidances of the same defense or counter-claim; but they must be separately stated and numbered.[4]

§ 493. The defendant may also demur to the reply, or to a separate traverse to, or avoidance of, a defense or counter-claim, contained in the reply, on the ground that it is insufficient in law, upon the face thereof.

SECTION 1. WHEN NECESSARY.

STERN v. FREEMAN.

Court of Appeals of Kentucky, 1863. 4 Metc. 309.

JUDGE BULLITT delivered the opinion of the court:

Freeman brought this action, and attached property belonging to Stern, a non-resident, to satisfy a note executed by him to the plaintiff. Stern answered, that, "at the time of the execution of said note, this defendant was an infant under the age of 21 years;" and this is the only defense that we need to notice.

Defendant's answer and the evidence show that the plaintiff and defendant were merchant partners until October 22, 1859, when the plaintiff sold his interest in the concern to the defendant, then under 21 years of age, in consideration of the note sued on, and other notes then executed. Defendant attained the age of 21 years in December, 1859. It is proved by parol evidence, that, up to the time this action was brought, in June, 1860, defendant, in his own behalf, carried on the business, selling the goods and collecting the debts, that formerly belonged to him and the plaintiff; and it is proved, that, in March, 1860, about three months after he attained the age of 21 years, he wrote a letter to Liebor, who owed money for goods purchased from Freeman and Stern, stating that he

[4] Under the New York Code a reply is the last pleading, and any matters therein set up may be met by the defendant's evidence, either negatively or affirmatively, without a rejoinder, Biggs v. Steinway, 191 App. Div. 526, (1920).

"had been collecting the debts due the firm of Freeman & Stern, and that he was going on in the same business in his own name." The chancellor rendered judgment for the plaintiff, to reverse which the defendant appeals. * * *

The note, having been executed when the defendant was under 21 years of age, was voidable; and the simple statement of the fact in his answer is sufficient. He was not bound to aver that the note was voidable, nor otherwise to state the law of the case.

But the plaintiff contends that the note was made unavoidable by the ratification of the defendant. And here the question arises, whether or not the plaintiff was bound to aver the ratification in his petition, or by an amended petition.

The Code of Practice declares, that, "there shall be no reply except upon the allegation of a counter-claim[5] or set-off in the answer;" (Sec. 132), and that, "the allegation of new matter in the answer, not relating to a counter-claim or set-off, * * * is to be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require." (Sec. 153.)[6] The question is, whether or not, under the old practice, the plaintiff could reply a ratification of the contract, in avoidance of the plea of infancy. If he could, he may, under the Code, prove the ratification without a reply, and without setting it forth in an amended petition.

Upon this question there seems to have been some conflict of opinion, as is shown by the cases referred to in Moor v. Williams, 11 Mees. & Welsby. Mr. Chitty, however, without referring to any conflict of opinion upon the subject, says, that to a plea of infancy in *assumpsit,* the plaintiff "may reply to the whole, or part, that the defendant ratified and confirmed the promise after he came of age." (1 Chitty Pl. 612.) And again, in speaking of replications which confess and avoid the plea, he says, that, "if infancy be pleaded, the plaintiff may reply that the goods were necessaries, or that the defendant, after he came of age, ratified and confirmed the promise." (Id. 657.) The doctrine stated by Mr. Chitty seems to be founded upon principle. The manner of pleading depends upon the question

[5] See Vassear v. Livingston, ante p. 621, and Bates v. Rosekrans, ante p. 628, to the effect that under a similar provision of the New York Code, where the answer sets up affirmative defences, they are not admitted by a failure to reply.

[6] For the present statute, see Code 1900, § 98.

whether the right of recovery, in such cases, is based upon the original contract, or upon the ratification. If upon the latter, it would have been necessary, under the old practice, in all actions, excepting, perhaps, *general* assumpsit, to declare upon the ratification, or to set it forth by a new assignment, in the form of a replication to the plea of infancy, which would have been, in effect, declaring anew upon the ratification. But if the right of recovery is based upon the original contract, the ratification, under the old practice, would have formed matter for a replication in confession and avoidance of the plea.

That the right of recovery, in many if not all such cases, is based upon the original contract, and not upon the ratification, seems to be conclusively proved by the fact, that, by the common law, the plaintiff may recover upon a contract made by the defendant during infancy, which he has ratified by merely failing to disaffirm it within a reasonable time after coming of age, (Kline v. Beebe, 6 Conn. 494; 2 Kent's Com. 238), since it is clear that a person cannot be held liable for failing to disaffirm a contract which he is not bound to disaffirm; and, also, by the fact that, by the common law, a sale of land by an infant may be ratified verbally, notwithstanding a statute prohibiting the sale of land except by writing. (Houser v. Reynolds, 1 Hayea 143; Wheaton v. East, 5 Yerger's Tenn. R. 41.) It seems clear, that in both those classes of cases the right of recovery is based, and can be based only, upon the original contract, the ratification having no effect whatever, except to prevent the defendant from avoiding his contract.

Probably where a person, after coming of age, has promised to pay a debt contracted during infancy, or has done an act from which the law implies such a promise, the plaintiff might declare upon the new promise, relying upon the original consideration to support it. But he is not obliged to do so. He may declare upon the original contract, and show the new promise, like any other ratification, in avoidance of the plea of infancy. This results necessarily from the fact that the contract is voidable only, and not void. It is valid until disaffirmed. No ratification is needed to make it binding. Disaffirmance is needed to invalidate it. The plaintiff may, therefore, sue upon it, and if the defendant pleads infancy, the plaintiff may avoid the plea by showing a promise, or other act of ratification, by which the defendant has deprived himself of the right to avoid

the contract. In such a case, the only effect of the ratification is to prevent the defendant from disaffirming the contract sued upon, which, being valid until disaffirmed, clearly forms the basis of recovery, the ratification forming matter of confession and avoidance to the plea of infancy.

It may be proper to add, that, under the Code of Practice, this question probably stands upon a different footing from that relating to an acknowledgment or promise, relied upon to save a claim barred by limitation.

It follows, from what we have said, that the plaintiff in this case had a right to prove a ratification of the contract, without averring it in his pleadings. * * *

Judgment affirmed.

STATE v. WILLIAMS.

Supreme Court of Missouri, 1871. 48 Mo. 210.

CURRIER, JUDGE. This suit is founded upon an attachment bond. The petition sets out its condition, which was in the usual form, and alleges as a breach of it that the plaintiff in the attachment failed to prosecute the same without delay and with effect, in breach of the condition of said bond. It was, moreover, averred that the attachment was abated by the judgment of the court, upon the trial of the issues raised by an appropriate plea in abatement.

The answer admits the execution of the bond, but denies the alleged breach of it; admits also the judgment of the court abating the attachment, but alleges that such judgment was not final; that in due time motions for arrest and for a new trial were filed, and that such motions were still pending and undisposed of in the court where the judgment abating the attachment was rendered.

The plaintiff made no reply, and the parties went to trial upon the issues raised by the petition and answer; and upon the trial the court ruled upon the evidence, and gave and refused instructions upon the theory that the affirmative allegations of the answer introduced new matter constituting a defense to the action, and that the facts so averred, in the absence

of a replication contesting them, stood admitted by the pleadings.

The question presented for consideration, therefore, is whether the affirmative allegations of the answer—to wit, that the attachment suit was still pending and undisposed of—presented new matter constituting a defense to the plaintiff's action, which required a replication in order to put such new matter in issue. The general rule on this subject is that any fact which avoids the action, and which the plaintiff was not bound to prove in the first instance in support of it, is new matter. (Stoddard v. Methodist Church, 12 Barb. 573.) But a fact which merely negatives the averments of the petition is not new matter, and need not be replied to. Moreover, an answer setting up new matter, by way of defense, should confess and avoid the plaintiff's cause of action. (Bauer v. Wagner, 39 Mo. 385; and see Northrup v. Miss. Val. Ins. Co., 47 Mo. 435.)

An application of these views to the answer in this cause will show that it fails to set out new matter constituting a defense. That which is claimed to be new matter merely contradicts the averments of the petition in an indirect way. The petition avers that the plaintiff in the attachment suit had failed to prosecute that suit without delay and with effect—that is, to final judgment in his favor. In order to sustain the suit, therefore, it was necessary for the plaintiff to show that the attachment suit had been finally disposed of adversely to the plaintiff in that suit. The defendant, in effect, avers that the suit is not finally disposed of, but that the same is still pending, awaiting the judgment of the court upon a motion for a new trial. That is no confession and avoidance of the plaintiff's cause of action. It is an allegation to the effect that no cause of action ever accrued upon the bond sued upon. It is, for instance, a denial of the allegation of the petition that the plaintiff in the attachment suit had failed to prosecute that suit with effect and without delay. There was, therefore, nothing in the answer requiring a reply.[7]

[7] See Craig v. Cook, 28 Minn. 232, (1885), where to a complaint in one count charging a breaking and entering of a house and assaulting and beating plaintiff, defendant answered argumentatively denying the trespass to land and justifying the assault and battery, and the court thought that the justification of the assault was not admitted by failure to reply, because it was not a defense to the

The other judges concurring, the judgment will be reversed and the cause remanded.

BENICIA AGRICULTURAL WORKS v. CREIGHTON.

Supreme Court of Oregon, 1892. 21 Ore. 495.

The complaint sought to recover a balance of $919.91 for goods sold and delivered. The answer consisted of certain denials, a plea of payment, a plea of account stated and payment of the balance found due, and a small counterclaim. The reply denied the plea of payment and the counterclaim. * * * * * * A trial before a jury resulted in a verdict for the plaintiff for the sum of eighty-three dollars and eighty-six cents. Thereafter the plaintiff moved for judgment on the verdict, and the defendants moved for judgment for their costs and disbursements notwithstanding the verdict. The plaintiff also moved that the verdict be set aside and for a new trial. The court thereupon ordered that the motion for judgment, notwithstanding the verdict, be overruled. * * * On the twenty-second day of November, 1890, plaintiff's motion for judgment on the verdict came on to be heard, and was allowed, and judgment entered in favor of the plaintiff for the amount found by the jury.

From this judgment the appeal is taken.[8]

STRAHAN, C. J. The notice of appeal contains numerous assignments of error upon which the appellants intended to rely upon this appeal, but the condition of this record renders a particular examination of them unnecessary.

The plea of a full settlement and payment of the amount found due the plaintiff upon such settlement is not denied by the reply, and must therefore, for the purpose of this action, be taken as true. (Adams v. Tuley, Ind. 27 N. E. Rep. 991; Bab-

action. At common law the assault and battery would have been considered mere matter of aggravation.

Where the matter set up in the answer does not amount to a defence at all, obviously there is no occasion to reply, West v. Cameron, 39 Kan. 736.

[8] Statement condensed and part of opinion omitted.

cock v. Farmers' and Drovers' Bank, 46 Kan. 548.) Section 72, Hill's Code, defines what the answer of the defendant shall contain. Subdivision 1 of the section requires a specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. The second subdivision of the section requires the answer to contain a statement of any new matter constituting a defense or counter-claim, in ordinary and concise language without repetition. Section 73 authorizes the defendant to set forth by answer as many defenses and counter-claims as he may have. Section 76 provides that when the answer contains new matter constituting a defense or counter-claim, the plaintiff may reply to such new matter, denying specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defense to such new matter in the answer. Section 78 provides, if the answer contain a statement of new matter, constituting a defense or counter-claim, and the plaintiff fail to reply or demur thereto, within the time prescribed by law the defendant may move the court for such judgment as he is entitled to on the pleadings, and if the case require it, he may have a jury called to assess the damages; * * *.

It is alleged in the answer, and not denied by the reply, that on the twenty-sixth day of September, 1889, the parties came to a full settlement and accounting of all matters relating to the sale of said goods, wares, and merchandise by the plaintiff to the defendants; and that upon said settlement there was found due and owing from the defendants to the plaintiff the sum of fifty-five dollars. This settlement merged the plaintiff's cause of action into the new contract thereby made, which was the sole measure and extent of the defendant's liability to the plaintiff on account of the goods, wares, and merchandise mentioned in the complaint; and when the amount found due upon such settlement was paid, all liability of the defendants to the plaintiff on account of said matters was fully discharged and ended. At any time after the reply was filed, and these material matters left undenied, the defendants were entitled, on motion, to a judgment in their favor for their costs and disbursements. It is not perceived that their right thereto was in any manner af-

fected by a failure[9] to make the motion until after the verdict.

This result requires a reversal of the judgment with directions to overrule the plaintiff's motion for judgment on the verdict and to sustain the defendant's motion for judgment notwithstanding the verdict.

SECTION 2. NEW ASSIGNMENT.

CAMPBELL v. BANNISTER.

Court of Appeals of Kentucky, 1880. 79 Ky. 205.

CHIEF JUSTICE COFER delivered the opinion of the court.

This was an action for slander in charging the plaintiff with the crime of arson. The defendant, by his answer, admitted that he spoke the words charged, but averred they were spoken to his wife in the privacy of his family, and were accidentally overheard by another person in the house, but not known to be within hearing, and thus, without having been so intended by him, became public. And he further averred that this was done without malice, and was the wrong and injury complained of in the petition.

In his reply, the plaintiff averred that it was not true that the defendant spoke the words complained of under the circumstances stated in the answer; and he also averred that the defendant had often spoken the words, or the substance of them, in the presence of divers persons.

With the pleadings in this condition, the parties went to trial, which resulted in a verdict for the plaintiff for one cent in damages, and his motion for a new trial having been overruled, he has appealed.

One whose house has been set on fire may communicate to his family, under proper precautions, and without malice, his suspicions as to who the incendiary is, and he will not be responsible to a person falsely accused for so doing.

[9] Where the case has been tried as if the defence had been put in issue, it is too late after verdict to take advantage of the failure to reply, McAllister v. Howell, 42 Ind. 15; see also Rhine v. Montgomery, ante p. 652.

If he be sued, the fact that he repeated the accusation to others may be given in evidence, for the purpose of proving that the communication to his family was malicious, and that was the only purpose for which evidence of other publications of the defamatory words was admissible in this case.

The plaintiff, having traversed the allegations of the answer, had no right to recover for any other publication that that admitted in the answer.

If that was not the publication for which he sued, he should have filed an amended petition, setting forth his cause of action more minutely and circumstantially, and could not, by anything contained in his reply, draw the defendant away from the particular publication admitted in the answer. This could only be done by a new assignment.[1]

A new assignment is not, properly speaking, a replication, since it does not profess to reply to anything contained in the defendant's answer, but throws aside as useless a previous pleading, or, rather, re-states, in a more minute and circumstantial manner, the cause of action alleged in the petition which the defendant, through mistake or design, has omitted to answer. It is, therefore, in the nature of a new petition, or, rather, it is a more precise and particular repetition of the matter contained in the original petition, so as to indicate that the plaintiff is suing for a matter other than that to which the answer relates. (Chitty on Pl., p. 653.) * * *

Judgment reversed.[2]

1 Turner, J., in Puget Sound Iron Co. v. Worthington, 2 Wash. Ter. 472, (1865): * * *

"The first matter assigned by the appellant as error which we shall notice is the failure of the court to sustain the demurrer to the reply. The appellant attacks the reply as a departure in pleading. The appellees attempt to sustain it as a new assignment of the contract described in the complaint. In our judgment it is neither. It is not a departure, because it is perfectly consistent with the complaint. It is not a new assignment, because there is no such thing as a new assignment, as that term was understood at common law, under our system of pleading. If, under our system, it becomes necessary for a party to restate his cause of action, he may do so by amendment. The reply must traverse, or confess and avoid. Code, § 86."

2 The judgment was reversed for error in the admission of evidence.

SECTION 3. DEPARTURE.

VAN DORN v. BODLEY.

Supreme Court of Indiana, 1871. 38 Ind. 402.

DOWNEY, J. The appellee sued the appellant on three promissory notes executed by the appellant to the appellee, in California, on the 22d day of January, 1855, two of which were payable generally and payable in the town of Covington, Fountain County, Indiana.

The defendant pleaded the statute of limitations of California, which bars actions upon promissory notes in four years, alleging that he was when the notes were executed, and ever since had been, a resident of that state.

The plaintiff replied, first, the general denial; second and third, a new promise made by the defendant, in writing, within four years prior to the time of the commencement of the action; * * *.

Demurrers to the second, third, and fifth paragraphs of the reply were overruled, and exceptions taken.

At the instance of the defendant, the court made a special finding and stated its conclusions of law. The defendant excepted to the finding as to the facts, as well as to the conclusions of law; and also moved for a *venire de novo*, which was overruled, and final judgment rendered for the plaintiff. There is no evidence nor any bill of exceptions in the record.

The only questions involved in the case are those upon the demurrers, and the conclusions of law upon the special finding. * * *

To reply a new promise[1] to pay a debt otherwise barred by the statute of limitations, is no departure.

It is conceded that it was not at common law; but it is claimed by counsel for appellant, that under the code it is different. We are referred to section 67 of the code, which authorizes the plaintiff, in his reply, to state "any new matter not inconsistent with the complaint." That was precisely the rule before the

1 Where a reply is necessary, matters avoiding the statute of limitations must be specially pleaded, and cannot be proved under a reply by way of denial only, Moore v. Granby, 80 Mo. 86, (1883).

code. The replication must be consistent with the declaration.

As early as the case of Zehnor v. Beard, 8 Ind. 96, it was said by the court, that "the inconsistency of the reply and the complaint is the same defect known in the old system as a departure in pleading." The practice is to declare upon the original promise, and when the statute is pleaded, to reply the new promise. The new promise is a waiver of the right to rely upon the statute, or its effect is to revive the former cause of action and give it vitality. Angell Limitations, sec. 288. That the new promise is now required to be in writing, does not change this rule. * * *

Judgment affirmed.

SCHOOL DISTRICT v. CALDWELL.

Supreme Court of Nebraska, 1884. 16 Neb. 68.

REESE, J. This action was brought by the plaintiff in the district court of Adams county, to restrain the defendants from selling the real estate described in the plaintiff's petition. The facts are as follows: On the eighteenth day of October, 1877, the defendants recovered a judgment against W. W. Fitzpatrick, J. M. Fitzpatrick, and J. S. McIntyre, in the district court of Lancaster county, for the sum of $1,053.33, and on the tenth day of December of the same year, a transcript of said judgment was filed in the office of the clerk of the district court of Adams county. On the thirteenth day of January, 1878, J. S. McIntyre, one of the judgment defendants, sold and conveyed the real estate in dispute to A. F. Boston, who, on the fourteenth day of November, 1879, conveyed it to R. A. Batty, and he afterwards conveyed it to the plaintiff. On the fourteenth day of August, 1882, an execution was issued on said transcript and levied on said real estate as the property of said J. S. McIntyre, the sale of which the plaintiff enjoined. Upon trial in the district court the injunction was dissolved and the case dismissed. The plaintiff appeals to this court.

The petition alleges that said judgment is not a lien on said real estate, for the reason that the instrument purporting to be a transcript of the judgment rendered by the district court of

Lancaster county does not show that the court had any jurisdiction over the said J. S. McIntyre, and that the pretended judgment was not docketed on the court records of Adams county, nor entered in the general index of judgments of said court, was not a lien on the real estate of the said J. S. McIntyre, and that the plaintiff purchased said property without any knowledge of the existence of said judgment. To this petition the defendants answered, setting up their judgment, alleging it was still in force, the filing of the transcript, that it was properly indexed, and that at the time of the filing of said transcript the said McIntyre was the owner of the property, and that their judgment was a lien thereon. The plaintiff replied, alleging that said judgment was fully paid and satisfied prior to the issuance of the execution, and that said payment and satisfaction was made by the payment of $290.20 on the fourth day of September, 1878, and by three promissory notes executed by said McIntyre, with J. B. McIntyre as surety, each of said notes being for the sum of $287.33, and that said notes were given and received in full satisfaction of said judgment, and had been since paid, in part, the unpaid notes being still held by the defendants. On the trial of the cause the plaintiff sought to prove this allegation of the reply, to which objection was made and the testimony rejected. Without stopping to inquire whether this question is or is not properly before the court, we will say that, if the fact exists, it is clear that it is one of the elements of the plaintiff's cause of action, and should have been alleged in the petition. "A plaintiff can recover only on the cause of action stated in his petition. It is not the province of a reply to introduce new causes of action. This can be done only by amendment to the petition." Maxw. Pl. & Pr. 108; Durbin v. Fisk, 16 Ohio St. 534. If the judgment has been paid, it should have been so alleged in the petition, so that the proper issue could have been formed upon that question, and tried as other issues tendered by the plaintiff in an action are tried. This not being done, there was no error in the ruling of the court. * * *

Judgment affirmed.

TRAINOR v. WORMAN.

Supreme Court of Minnesota, 1885. 34 Minn. 237.

GILFILLAN, C. J. * * * This being so, there is, so far as the allegations in the reply may be claimed to help the complaint, a clear case of departure in the pleadings; for the complaint alleges and relies on a complete performance of the contract according to its terms, while the reply admits a failure to perform as to time, and relies on new matter therein alleged as an excuse for such failure. There is a departure when a party quits or departs from the case or defense which he first made, and has recourse to another. 1 Chit. Pl. 674; Gould Pl. c. 8, 65, 66, 72; Warren v. Powers, 5 Conn. 373; Larned v. Bruce, 6 Mass. 57; Estes v. Farnham, 11 Minn. 312, (423). A test of departure suggested in the last case is, could evidence of the facts alleged in the reply be received under the allegations of the complaint? If not, then there is a departure. It needs only a statement of it to show that an allegation of full performance will not admit proof of an excuse for non-performance.

The plaintiff should have drawn his complaint according to the facts; or, if he did not so draw it in the first instance, he ought to have made it conform to the facts as soon as he received the answer apprising him that he would be required to prove his case as he alleged it. The defendant raised the objection properly by his request for a charge, in effect, that plaintiff could recover only upon proof of performance as alleged in the complaint. But the objection to the plaintiff's evidence, offered after defendant rested, of an excuse for non-performance, was not well taken. For, though plaintiff could not plead in his reply and prove such excuse as part of his cause of action, he could both plead and prove it as a defense to defendant's counterclaim. That is, as the pleadings stood, though plaintiff could not have the benefit of that evidence as a ground of recovery by himself, he could have the benefit of it so far as to prevent a recovery by defendant on his counterclaim.

Judgment reversed.

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